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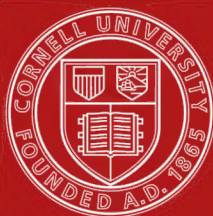
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A COMMENTARY
ON THE
LAW OF CONTRACTS.

BY
FRANCIS WHARTON, LL.D.,
AUTHOR OF TREATISES ON CONFLICT OF LAWS, ON EVIDENCE, ON AGENCY, ON NEGLIGENCE,
AND ON CRIMINAL LAW.

IN TWO VOLUMES.

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ADDENDA ET CORRIGENDA.

- Vol. II., page 21, § 642, 1st line, *for* "distinct," *read* "distinctive."
" " " 4th line, *for* "latter," *read* "former."
" 60, at end of note 1, *add* "See *supra*, § 186."
" 205, at end of note 7, *add* "1033-6."

M9054.

CONTRACTS.

CHAPTER XVIII.

ALTERNATIVE PROMISES.

Alternative promises may be at election of either party, § 619.	must notify promisor of his choice, § 621.
Unless otherwise provided, election is with promisor when mode of performance is alternative, § 620.	Election limited by its own terms, § 622.
When election is with promisee, he	Election is final, § 623.
	When one alternative is impossible, the other is imperative, § 624.

§ 619. AN alternative promise may be at the election of the promisor or of the promisee. The promisor may reserve to himself to do one of two or more things; or he may agree to do one of two or more things at the election of the promisee. He may say, for instance, "I will sell you one of this row of houses, whichever I choose;" or he may say, "I will sell you one of this row of houses, whichever *you* choose." When the promisor has the choice, then he is chargeable only in case of his refusing to exercise and effectuate the choice, *e. g.*, only in case he refuses to pick out and convey one of the row of houses. He need not, however, make his election until the time when the promise is to be performed;¹ unless when from the nature of the transaction the duty to make a prior notification is to be inferred.²—How far "option" contracts are illegal, as wagers, is already discussed.³—When a note is in

Alternative promises may be at the election either of promisor or promisee.

¹ Townsend *v.* Wells, 3 Day, 327.

² Aldrich *v.* Albee, 1 Greenl. 120; Plowman *v.* Riddle, 7 Ala. 775.

³ *Supra*, §§ 449 *et seq.* The topic in

the text is discussed by Dr. Emil Bernstein, in an essay entitled *Zur Lehre vom alternativen Willen und den alternativen Rechtsgeschäften*, Berlin,

the alternative, as when it is payable in money, or furniture, or other specific articles, the debtor has an election to pay in money or such specific articles; and, as we will see more fully hereafter,¹ after the day of payment has elapsed without payment, the creditor has the right to demand payment in money.²

§ 620. When the election is merely as to the mode of performance, and when it is conditioned on the convenience or capacity of the promisor, then the election is with the promisor; and when an alternative mode of performance is reserved, and the election is not given to the promisee, it ordinarily rests with the promisor.³ Thus, when C. contracted with E. to deliver him "from one to three thousand bushels of potatoes," it was held that C. had the option of delivering any

Unless otherwise provided, election is with promisor when mode of performance is alternative.

1878. He takes up the question of the object of alternative obligations, —whether it is both alternatives or neither, or only the alternative that is ultimately chosen. Two conflicting theories are noticed. By the first, both objects are in view at the time of entering into the obligation, and one of these is liberated by the subsequent action determining the choice. By the other theory, there is no object in view until one is finally elected. According to Bernstein, both objects may be regarded as in the creditor's view, and both within the range of the debtor's duty. This distinction is also taken by Windscheid, see *Kritische Vierteljahrsschrift für Gesetzgebung*, etc., N. S. vol. iv. 310.—"Die sogenannte alternative Obligation" is the title of a treatise by Dr. Gustav Pescatore, published in Marburg, in 1880. Its object is to establish on the basis of the Roman law a solution of this topic. The maxim; *duae res in obligatione, una in solutione*, is declared vague and unsatisfactory. The prevalent view among modern German jurists is, that an alternative is a conditional obliga-

tion; "if I do not do the one thing, I will do the other." This view, which is held by Fitting, Windscheid, Brinz, and Bernstein, is controverted by Pescatore, who admits, however, that obligations with an option reserved to the creditor are conditional. Only those in which the option is reserved to the debtor he holds are alternative.

¹ *Infra*, § 623.

² *Heywood v. Heywood*, 42 Me. 229; *Church v. Peterow*, 2 P. & W. 301; *Trowbridge v. Holcomb*, 4 Oh. St. 38; *Choice v. Moseley*, 1 Bailey, 136; *Plowman v. Riddle*, 7 Ala. 775; *Mitchell v. Gregory*, 1 Bibb, 449; *Shrewsbury v. Buckleys*, 4 Bibb, 260; *Lawrence v. Dougherty*, 5 Yerg. 435; *Miller v. McClain*, 10 Yerg. 245. As to notes payable in goods, see *supra*, § 599.

³ *Layton v. Pearce*, 1 Doug. 16; *Penny v. Porter*, 2 East, 2; *Small v. Quincy*, 4 Greenl. 497; *Appleton v. Chase*, 19 Me. 79; *Morton v. Webb*, 36 Me. 270; *Mayer v. Dwinell*, 29 Vt. 278; *Smith v. Sanborn*, 11 Johns. 59; *State v. Worthington*, 7 Ohio, 171; *Church v. Peterow*, 2 P. & W. 301.

number of bushels he chose between one and three thousand bushels.¹ And, as a general rule, "in case an election be given of two several things, always he that is the first agent, and which ought to do the first act, shall have the election."²

§ 621. When, from the whole agreement, it appears that the promisee is to have his choice between the alternatives, then the election is to be with him.³ In such case the promisee must notify the promisor of his election, if the more stringent of the alternatives be taken, as a condition precedent to charging the promisor.⁴ Thus, where a lease provided that the rent should be paid either quarterly or half-quarterly, it was held that the lessor could not distrain at the end of the half-quarter without giving lessee notice of his intention to take

When election is with promisee, he must notify the promisor of his choice.

¹ *Small v. Quincy*, 4 Greenl. 497. In *Disborough v. Neilson*, 3 John. Cas. 81, C. agreed to deliver to E., by the first of May, from seven hundred to one thousand barrels of meat, at six dollars a barrel, to be paid on delivery. C. delivered seven hundred barrels, and, before the first of May, tendered to E. three hundred additional barrels. These E. refused. It was held that he was bound to pay for the whole one thousand barrels, the delivery of the final three hundred being at C.'s option.

² Co. Lit. 145, a; *South E. R. R. v. R. R.*, 17 Q. B. 485. When a sum is payable to A. or B., A. and B. may sue jointly. *Willoughby v. Willoughby*, 5 N. H. 244; *Osgood v. Pearsons*, 4 Gray, 455; *Walrad v. Petrie*, 4 Wend. 578. That when a promisor issued on an alternative promise both alternatives must be negatived, see *Richards v. Black*, 6 C. B. 437; *Leigh v. Lillie*, 6 H. & N. 165; *Gilman v. Moore*, 14 Vt. 457; *Plowman v. Riddle*, 7 Ala. 775; that when a party is allowed to pay or make satisfaction in one of two ways, he has a right to the way he may choose, *Layton v. Pearce*, 1 Doug. 15;

Brookman's Trusts, L. R. 5 Ch. 182; *Tielns v. Hooper*, 5 Ex. 853; *Elkins v. Parkhurst*, 17 Vt. 105. Hence, when money was loaned for the term of six or of nine months, it was held that the borrower, for whose benefit the contract was, had the election as to the time of repayment. *Reed v. Kilburn Soc.*, L. R. 10 Q. B. 264. And where goods are sold on a credit of six or nine months, the duration of the credit is at the election of the purchaser. *Price v. Nixon*, 5 Taunt. 338; *Helps v. Winterbottom*, 2 B. & Ad. 436, cited Leake, 2d ed. 677; see *Middlesex v. Thomas*, 5 C. E. Green, 39; *Burkhalter v. Bank*, 42 N. Y. 538; *Archibald v. Argall*, 53 Ill. 307.

³ *Supra*, § 567; Leake, 2d ed. 677; *Fordley's case*, 1 Leon. 68; *Chippendale v. Thurston*, 4 C. & P. 98; *Roberts v. Beatty*, 2 P. & W. 3.

⁴ *Supra*, §§ 567 *et seq.*; Leake, 2d ed. 678; *Vyse v. Wakefield*, 6 M. & W. 442; *Ripplinghall v. Lloyd*, 5 B. & Ad. 742; *Watson v. Walker*, 23 N. H. 471; *Clough v. Hoffman*, 5 Wend. 500; *Topping v. Root*, 5 Cow. 404; and cases cited *supra*, §§ 557, 561.

the half-quarterly alternative.¹ It is otherwise, however, when, from the structure of the agreement, it appears that a notice by the promisee was not intended by the parties.²—As a general rule, when, from the circumstances of the case, injustice will be done to the party unless notice of the election be previously given to him, then such notice should be given.³

§ 622. The election is limited by its own terms.⁴ When the party having the option is bound by the contract to exercise it within a certain period, if he let that period elapse without exercising the option, the right is forfeited.⁵ The same distinction is applicable to place. If the right to perform an alternative at a particular place is not complied with, *e. g.*, where property is to be delivered at a particular place, or money paid, then the election right is forfeited.⁶

§ 623. We have already seen that when an election is to be exercised as to rescission or ratification, such election is final.⁷ The same rule applies when an election is open between alternative conditions. The alternative chosen must be adhered to.⁸ By failure to avail himself of one alternative, in the way limited by the contract, the promisor becomes finally bound to the other.⁹ Thus, where rent

¹ *Mallam v. Arden*, 10 Bing. 299.

² *Townsend v. Wells*, 3 Day, 327; *supra*, § 567.

³ *Plowman v. Riddle*, 17 Ala. 775; *Aldrich v. Albee*, 1 Greenl. 120; *supra*, §§ 567, 571 *et seq.*

⁴ *Heywood v. Heywood*, 42 Me. 229; *Church v. Feterow*, 2 P. & W. 301; *Choice v. Moseley*, 1 Bailey, 136; *Plowman v. Riddle*, 7 Ala. 775.

⁵ *Shearer v. Jewett*, 14 Pick. 232. As to legality of "option," see *supra*, § 453.

⁶ *Stewart v. Donelly*, 4 Yerg. 177. As to performance in respect to place, see *infra*, §§ 871 *et seq.*

⁷ *Supra*, § 290; *Benj. on Sales*, § 359; *Brown v. Ins. Co.*, 1 E. & E. 853; *Gath v. Lees*, 3 H. & C. 558; *Lynch v. O'Donnell*, 127 Mass. 311.

⁸ *Leake*, 2d ed. 679, citing *Brown v. Ins. Co.*, 1 E. & E. 853, in which Lord Campbell, C. J., said: "Where there is an election, given by contract, and the election is made, it is the same as if there had been no election; and the party is absolutely bound to do that which he has elected to do." *S. P.*, *Gath v. Lees*, 3 H. & C. 558; *Heywood v. Heywood*, 42 Me. 229; *Townsend v. Wells*, 3 Day, 327; *McNitt v. Clark*, 7 Johns. 465; *Church v. Feterow*, 2 P. & W. 301; *Choice v. Moseley*, 1 Bailey, 136; *Laurence v. Dougherty*, 5 Yerg. 435; *Miller v. McClain*, 10 Yerg. 245; *Plowman v. Riddle*, 7 Ala. 775; *Collins v. Whigham*, 58 Ala. 438.

⁹ *Stewart v. Donelly*, 4 Yerg. 177; *Townsend v. Wells*, 3 Day, 327; *McNitt v. Clark*, 7 Johns. 465; *Nesbitt v. Pear*

was reserved by agreement "to be paid quarterly or half-quarterly if required," the landlord, as we have seen, was held to be precluded after taking a series of quarterly payments from the first payment on, from calling for half-quarterly payments.¹

§ 624. When one of two alternatives becomes impossible (as where one of two dates becomes impracticable), then the promisor is bound to perform the other alternative.² When one of the periods has elapsed, then the other becomes obligatory.³ And when a note is payable, at any time before maturity, in specific articles, the election so to pay is terminated by maturity. After that period the payee's right to demand money is absolute.⁴ An important exception to the above rule exists in cases where one of the alternatives is inoperative under the statute of frauds. In such case "it is manifest that of such alternative engagements no action will lie upon that one which, if it stood alone, could be enforced as being clear of the statute of frauds, because the effect would be to enforce the other; namely, by making the violation of it the ground of an action."⁵ "The principle of the rule is that where the contract is entire, no one part being severable from the other, and part of it is within the statute, the other part cannot be enforced. To constitute a cause of action on the agreement it was necessary to aver a breach of both alternatives of the promise, and as under the statute there could be no breach of the promise in respect to the land, there could be no cause of action on the promise in respect to the money."⁶

When one alternative is impossible, the other is imperative.

son, 33 Ala. 668. As to time as a condition see *supra*, § 557; *infra*, §§ 881 *et seq.*

¹ *Mallan v. Arden*, 10 Bing. 299.

² *Stevens v. Webb*, 7 C. & P. 60; *infra*, § 328.

³ *Choice v. Mosely*, 1 Bailey, 136, and cases cited *supra*, § 328.

⁴ *Roberts v. Beatty*, 2 Pen. & W. 63;

supra, § 328; *Church v. Feterow*, 2 Pen. & W. 301.

⁵ *Browne*, Stat. of Frauds, § 152. *Patterson v. Cunningham*, 12 Me. 506; *Crawford v. Morrell*, 8 Johns. 253; *Van Alstine v. Wimple*, 5 Cow. 162; *Goodrich v. Nickols*, 2 Root, 498.

⁶ *White, J.*, *Howard v. Brower*, Sup. Ct. Ohio, 1861, 13 Rep. 215; see *supra*, § 328.

CHAPTER XIX.

INTERPRETATION AND CONSTRUCTION.

I. INTERPRETATION.

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 Genuineness of text to be first established, § 629.
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II. CONSTRUCTION.

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Exceptions to be strictly construed, § 666.	In doubt more benignant construction is to be preferred, § 672.
Specific meaning to be brought out, § 667.	When there are two inconsistent clauses, the first prevails, § 673.
Mere surplusage may be stricken out, § 668.	<i>Expressio unius est exclusio alterius</i> , § 674.
But not material qualifications, § 669.	[As to construction of conditions, see <i>supra</i> , §§ 553-8.]

I. INTERPRETATION.

§ 627. BETWEEN interpretation and construction several important points of difference are to be noted. In the first place, the office of interpretation is to determine the meaning of words: that of construction to determine the meaning of the whole document of which these words are the ingredients. A foreign word, or a term of art, for instance, appears in a document; or a term that is illegible or otherwise obscure. The meaning of this word must be determined before the meaning of the document of which the word is part can be collected. The word "usance," to take a case elsewhere noticed, appears in a contract; to attempt to construe the contract until this word is interpreted would be futile, and so with regard to the word "danseuse" in a contract by a theatrical manager. Until this word is interpreted the contract cannot be construed;¹ and the work of interpreting the word is entirely distinct from that of subsequently construing the contract.—Then, secondly, the faculties required for interpretation are very different from those required for construction. The faculties required for interpretation are linguistic; they are such as concern the determining the meaning of words. Of this the simplest illustration is that of the interpreter who is called into court to translate the words of a foreign witness who cannot speak in the vernacular. Or the language of a past era has to be explained; and of this we may take as an illustration a case elsewhere noticed, where, in order to explain the

Distinction between construction and interpretation.

¹ *Infra*, § 630.

word "Gottesdienst," as used in a church contract among Pennsylvania Germans fifty years previously, it was held allowable to show that at that period "divine service" did not include Sunday-schools.¹ Or the object may be to show the sense in which a word is used in a foreign country, or the sense in which it is used by a local custom in our own land; and to show this, extrinsic proof may be received.² For the work of interpretation, therefore, the mind works objectively, the object being to determine critically something outside of its own operations—*e. g.* the meaning of a foreign or ancient word, or of a term of art is to be sought, or the sense in which a word was used by those by whom the document in issue was framed to be explored. On the other hand, the work of construction is mainly logical. The question is—not as to the meaning of particular words, for that is settled before we begin the construction of the document in which these words occur—but, what is the general sense of the document, and to get at this we have to resort to such logical laws as will enable us to draw conclusions which will be both just and consistent. The office, therefore, of interpretation is analytic, that of construction is synthetic; the office of the one is to get at the facts, that of the other to group these facts and determine their meaning; interpretation is exploration, construction is induction. Interpretation goes outside of the text and appeals to extrinsic proof to get at the meaning of the text; construction is limited to criticism of the text as thus discovered.—Another important distinction remains to be noticed: interpretation goes to questions of fact, mainly for the jury; construction to matters of law, mainly for the court.³ Whether a term of art, or a foreign or obsolete word has a particular meaning is for the jury to determine;⁴ when this is determined, then it is for the court to give the general sense of the collocation of words of which the disputed words are part. It is true that the rules of interpretation and of construction are necessarily more or less blended, since in de-

¹ Gass' App., 73 Penn. St. 39; *infra*, § 635.

² *Infra*, §§ 631, 661.

³ See *infra*, §§ 631, 647 *et seq.*

⁴ Wh. on Ev. §§ 493, 939.

termining the meaning of a word we have to appeal sometimes to the context, just as in determining the context we have to throw ourselves into the position of the author when he used the particular words. Nevertheless, the function of determining the meaning of words singly, and the function of determining the effect of those words after they are defined, are as different as are etymology and logic. And they will be so considered in this chapter.¹

§ 628. Interpretation has been classified as (1) literal (*interpretatio restrictiva*), (2) liberal (*interpretatio extensiva*), (3) arbitrary (*interpretatio predestinata*), (4) authoritative (*interpretatio declarativa*).—(1) Literal interpretation is where the letter is closely followed, as where, in interpreting a statute, the term “man” is given an exclusively masculine sense, and where metaphorical terms are construed literally, *e. g.*, the term death by “shedding of blood,” in a statute, being held to mean exclusively death by a wound from which blood flows.² The literal meaning, however, is not to be adopted so as to destroy the meaning.³ Thus the literal meaning of “ten pockets of hops” would make the quantity very small; but evidence is admissible to show that a “pocket” is a hundred-weight, and this meaning, when proved, will be accepted.⁴ (2) Liberal interpretation is the ascription to words of their largest sense. Of this we have an illustration in the interpretation of the words “regulate commerce” in the constitu-

Classifica-
tion of
interpreta-
tion.

¹ Dr. Lieber, *Legal and Political Hermeneutics* (3d edition, 1880, by Hammond), thus expresses the distinction: “Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey.” (p. 11.) “Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the

spirit though not within the letter of the text.” (p. 44.) “That branch of science which establishes the principles and rules of interpretation and construction is called *hermeneutics*, from the Greek *ἑρμηνεύω*, to explain, to interpret; and the actual interpretation of them *exegesis*, from the Greek *ἐξηγησις*, explanation. Hermeneutics and exegesis stand in the relation to each other as theory and practice.” (p. 52.)

² See Lieber, *op. cit.* 57.

³ *Infra*, § 654.

⁴ *Spicer v. Cooper*, 1 Q. B. 424.

tion of the United States, so as to include the right to establish inter-state railroads and canals, and to charter a bank. (3) Arbitrary interpretation is that which subordinates interpretation to pre-assumed construction, making the word mean that which the interpreter thinks most consistent with a preconceived scheme of his own. In this way construction is erroneously made the basis of interpretation, and not interpretation the material for construction. (4) Authoritative interpretation is that which accepts the meaning of a term as it has been affixed by the state acting either through its legislature or its judiciary. We have illustrations of this in recent statutes in which terms used are specifically defined, and still more numerous illustrations in those judicial rulings by which technical terms—*e. g.*, tenancies “in fee,” “in tail,” “after possibility of issue extinct”—have received a settled juridical meaning. When such a meaning has been accepted as giving the meaning of the terms likely to have been taken by the parties, then it controls. But it does not control when the parties used the term in an independent sense of their own.¹—As distinguished from the above kinds of interpretation is the real—*e. g.*, that which seeks to give to each word the sense in which it was used by the party from whom it emanates.²

¹ See *infra*, §§ 632, 655.

² See Lieber, *ut supra*; Koch, II. 221; Unterholzner, Schuldverh. tit. Auslegung; Ihering, Aufsätze, 1881; Thöl, Handelsrecht, III. Bd. tit. Auslegung; Vangerow (substantially following the above analysis), I. 46–53, 158; Thüsing, über die Auslegung der Rechtsgeschäfte; Savigny, Syst. des heut. Röm. Rechts, I. § 32; Wächter über Auslegung der unter abwesenden geschlossenen Verträge; Thibaut, Theorie der logischen Auslegung; Zachariä, versuch einer allgemeinen Hermen.

Dr. Lieber (Hermeneutics, 108) gives the following as “the elementary principles of interpretation”:—

“1. A sentence, or form of words, can have but one true meaning.

“2. There can be no sound interpretation without good faith and common sense.

“3. Words are, therefore, to be taken as the utterer probably meant them to be taken. In doubtful cases, therefore, we take the customary signification rather than the grammatical or classical; the technical rather than the etymological—*verba artis ex arte*; tropes as tropes. In general, the words are taken in that meaning which agrees most with the character of both the text and the utterer.

“4. The particular and inferior cannot defeat the general and superior.

“5. The exception is founded upon the superior.

“6. That which is probable, fair,

§ 629. The first office of interpretation is to determine the genuineness of the text.¹ To establish or disprove this experts may be called;² and ancient history may be appealed to to establish or to explain anachronisms.³ When a writing is offered in evidence in which a spurious word is alleged to have been interpolated, it is admissible to apply chemical and microscopic,⁴ as well as circumjacent tests;⁵ and to show the falsity of the alleged interpolation.⁶ And so, *a fortiori*, when a whole document is alleged to have been forged.⁷

Genuine-
ness of text
to be first
established.

§ 630. Terms of art, also, having a distinctive meaning among specialists, may be explained by specialists.⁸ Evidence, for instance, is admissible to show the meaning of "zinc" and of "franklinite," when used in a mining deed;⁹ and of "danseuses" when used in a theatrical agreement.¹⁰ Terms of business, also, will be governed by the sense they have received in business usage.¹¹ Mercantile terms are to be construed according to the custom of merchants;¹² and these terms, when local and distinctive, are to be proved as matters of fact to the jury, subject to the opinion of the court as to the construction of the contract after the meaning of the words is thus determined.¹³

Terms of
art and
business to
be ex-
plained by
parol.

and customary is preferable to the improbable, unfair, and unusual.

"7. We follow special rules given by proper authority.

"8. We endeavor to derive assistance from that which is more near before proceeding to that which is less so.

"9. Interpretation is not the object, but a means; hence superior considerations may exist."

The first of the rules I doubt. In view of the limitations (1) of our perceptive powers, (2) of the objects we perceive, and (3) of our modes of expression, we can hardly speak of the meaning of any sentence as being ever more than highly probable.

¹ Lieber, *op. cit.* 72.

² Wh. on Ev. §§ 704, 718, 722, 972.

³ Ibid. § 964.

⁴ Wh. on Cr. Ev. § 848.

⁵ Ibid. § 849.

⁶ Ibid. § 850.

⁷ Ibid.

⁸ Wh. on Ev. §§ 435, 946; *Pollen v. Le Roy*, 30 N. Y. 549; *Colwell v. Lawrence*, 38 Barb. 643; *Collender v. Dinsmore*, 55 N. Y. 200.

⁹ *New Jersey Zinc Co. v. Franklinita Co.*, 15 N. J. Eq. 418.

¹⁰ *Baron v. Placide*, 7 La. An. 229.

¹¹ See other cases in Wh. on Ev. §§ 961 *a*, 962-8.

¹² *Chitty on Con.* 11th Am. ed. 116; *Gibson v. Young*, 8 Taunt. 254.

¹³ Ibid.; *Hutchinson v. Bowman*, 5 M. & W. 535; *Barnard v. Kellogg*, 10 Wall. 383; *Worcester Med. Inst. v. Harding*, 11 Cush. 289; *Rice v. Cod-*

§ 631. When it is necessary to take testimony to determine the meaning of a term of art or business, the meaning of the term is for the jury; when this meaning is ascertained, the construction of the whole document, incorporating this meaning, is for the court.¹ Where, however, there is no dispute as to the meaning of terms, the question of construction is exclusively for the court.² "It is the duty of the court to construe all written instruments, if there are peculiar expressions used which have in particular places or trades a known meaning attached to them; it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was."³ Hence, as will be hereafter more fully seen,⁴ the meaning of words is to be found by the jury as a matter of fact, while the construction of the words thus settled is to be found by the court as a matter of law.⁵

Meaning of terms of art or business is for jury; construction of meaning is for court.

man, 1 Allen, 377; Luce v. Ins. Co., 105 Mass. 297; Schnitzer v. Print Works, 114 Mass. 123; Page v. Cole, 120 Mass. 37; Wayne v. St. Pike, 16 Ohio, 421; and cases cited Wh. on Ev. § 961.

Windscheid (§ 84) states that the fundamental rule of interpretation is the bringing out the sense in which the word to be interpreted was used; and that for this purpose, not only the usage of the place and time of writing, but the idiosyncrasies of the writer, are to be taken into consideration. To this are cited L. 50, § 3, D. de leg. 10, 30; L. 65, § 17; L. 69, § D. de leg. III. 32; L. 18, § 3, D. de instr. 33, 7; L. 34, D. de R. I. 50, 17.

¹ Neilson v. Harford, 8 M. & W. 806; Ford v. Beech, 11 Q. B. 852; Simpson v. Margitson, 11 Q. B. 32; Hodgson v. Davies, 2 Camp. 530; Barnard v. Kellogg, 10 Wall. 383; Staggs v. Ins. Co., 10 Wall. 589; May v. Sloan, 101 U. S. 231; Nash v. Drisco, 51 Me. 417; Pierce v. State, 13 N. H. 536; Wason

v. Rowe, 16 Vt. 525; Eaton v. Smith, 20 Pick. 150; Glass Co. v. Morey, 108 Mass. 570; School Dist. v. Lynch, 33 Conn. 330; Bradley v. Wheeler, 44 N. Y. 496; Edwards v. Goldsmith, 16 Penn. St. 45; Evans v. Waln, 71 Penn. St. 69; Brown v. Hatton, 9 Ired. 319; Paris, etc. R. R. v. Henderson, 89 Ill. 86; State v. Hastings, 24 Minn. 78.

² *Supra*, § 647; Wh. on Ev. § 966; Smith v. Margitson, 11 Q. B. 852.

³ Parke, J., Hutchinson v. Bowker, 5 M. & W. 535. See to same effect Eaton v. Smith, 20 Pick. 150; Short v. Woodward, 13 Gray, 86.

⁴ *Infra*, § 647.

⁵ In McKenzie v. Sykes, Sup. Ct. Mich. 1882 (13 Rep. 400), we have the following from Cooley, J.: "It is for the court to interpret the written contracts of parties; for when they have assented to definite terms and stipulations and incorporated them in formal documents, the meaning of these it is supposed can always be discovered on inspection; nothing which is within

§ 632. The last qualification cannot be overlooked without prejudicing the first. Parties familiar with business are apt to use terms in the sense in which these terms have been construed by the local courts. Hence, when a word has attached to it by such courts a settled technical meaning, parties are to be supposed to use that word with the same meaning.¹ Thus, in a lease, the words "demise" and "let" import a covenant in law for title and for quiet enjoyment during the term.² And the word "ton," in a contract for the sale of iron, will be interpreted as the statutory ton.³ But the legal meaning, no matter how settled, must yield to the sense in which the term is used by the parties.⁴ "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it."⁵ The true meaning is to override any arbitrary technical meaning;⁶ and the popular meaning is to override the technical meaning when the parties used the word in the popular sense.⁷ This, as we will hereafter see, is eminently the case with informal documents, emanating from business men, in which they must be supposed to have used terms in their common business sense.⁸

Accepted legal meaning of words to be received.

the purview of the contract is left in doubt, and there is, of course, nothing to submit to the jury. *Thompson v. Richards*, 14 Mich. 172. But where the terms of a negotiation are left to oral proofs, the question what the parties said and did, and what they intended should be understood thereby, is single, and cannot be separated so as to refer one part to the jury and another part to the judge; but in its entirety the question is one of fact. *Strong v. Saunders*, 15 Mich. 339; *Maas v. White*, 37 ib. 126; *Estate of Young*, 39 ib. 429; *Eagle v. Campbell*, 42 ib. 565."

¹ *Hart v. Hammett*, 18 Vt. 127; *Clark v. Pinney*, 7 Cow. 681; *Ellmaker v. Ellmaker*, 4 Watts, 89.

² *Leake*, 2d ed. 236; *Line v. Stephenson*, 5 Bing. N. C. 183; 7 Scott, 69; *Mostyn v. Coal Co.*, L. R. 1 C. P. D. 145.

³ *Evans v. Myers*, 25 Penn. St. 114.

⁴ *Infra*, § 638; *Browning v. Wright*, 2 B. & P. 24; *Biddlecomb v. Bond*, 4 A. & E. 322.

⁵ *Schuyl. Nav. Co. v. Moore*, 2 Whart. 491.

⁶ *James, L. J., Greenwood v. Greenwood*, L. R. 5 Ch. D. 956.

⁷ *Mallan v. May*, 13 M. & W. 51; *Robertson v. French*, 4 East, 130; *Stanley v. Ins. Co.*, L. R. 3 Ex. 71; *Schuylkill Nav. Co. v. Moore*, 2 Whart. 491.

⁸ *Infra*, § 638.

§ 633. If there is a variance between descriptive averments in a deed, and natural objects referred to as monuments, then the latter, if of a fixed and permanent character, are to prevail. It is not improbable that the surveyor, from whose notes the deed is made up, may have made a mistake in his reckoning. But it is very improbable that he should have made a mistake in referring to any conspicuous permanent natural monuments.¹ "It is more likely that men may commit an error in courses, or distances, or admeasurements, or in reference to ideal lines, such as those of surveys, than in monuments, and fixed and stationary objects, visible on the very land; and that in purchases and sales and bounties, the latter, as the best ordinary means of information, as well as of exclusive possession, are uppermost in their minds, and regulate their acts, and intentions. Hence, a known spring, referred to as the corner of a boundary line, has always been deemed a more certain reference, in the understanding of the parties, than the ideal line of a survey of the land of another person, supposed to terminate at the same place."² It is true that boundary lines, when settled by a deed, and when capable of consistent explanation, cannot be varied by parol.³ But when stakes, stones, or other signs are referred to, then their position may be determined by extrinsic proof, and, when they are of a permanent character, they are to be regarded, unless mistake be shown, as the final arbiters.⁴ So parol evidence is admissible to show the changes in monuments and stakes.⁵—It should be added that when, from the whole tenor of the document, it appears that the name of a person or of a thing is given in a particular sentence erroneously, it may be corrected by the con-

¹ *Cleaveland v. Smith*, 2 Story, 279.

² Story, J., *ibid.*; see Story on Cont. § 778; citing also, among other cases, *Smith v. Galloway*, 5 B. & Ad. 43; *Newsom v. Pryor*, 7 Wheat. 7; *Machias v. Whitney*, 16 Me. 343; *Boardman v. Reed*, 6 Pet. 328; *Frost v. Spaulding*, 19 Pick. 445.

³ *Linscott v. Fernald*, 5 Greenl. 496; *Liverpool Wharf v. Prescott*, 4 Allen,

22; *Clark v. Baird*, 9 N. Y. 183; *Waugh v. Waugh*, 28 N. Y. 94; *Wynne v. Alexander*, 7 Ired. L. 237.

⁴ *Wing v. Burgiss*, 13 Me. 111; *Gerish v. Towne*, 3 Gray, 82; *Pettit v. Shepherd*, 32 N. Y. 97; *Reed v. Shenck*, 3 Dev. L. 65; *Colton v. Seavey*, 22 Cal. 496.

⁵ *Robinson v. Kine*, 70 N. Y. 147.

text.¹—But merely descriptive words and recitals are not to be permitted to control the general sense of the contract.²

§ 634. Cyphers, short-hand expressions, abbreviations, and obscurities caused by the use of obsolete words, or by the wearing away of the paper, may be explained by experts, subject to the revision of their testimony by court and jury.³ Informal memoranda may also be explained by parol, when they are used as short-hand and elliptical signs of a meaning understood between the parties.⁴ This is necessarily the case with telegrams, which are sometimes in cypher, and are almost invariably compressed into a few salient words.⁵

Cyphers and abbreviations may be explained by experts.

§ 635. We have no right, in construing an ancient document, containing words whose meaning time has changed, to give such words a meaning which, though correct now, would not have been correct at the time of their selection by the parties.⁶—"Every grant shall be expounded as the intent was at the time of the grant; as if I grant an annuity to J. S. until he be promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterwards is made an archdeacon, yet if I offer him a competent benefice, according to his estate at the time of the grant, the annuity doth cease."⁷—An illustration already noticed is to be found in a Pennsylvania case, in 1873, in which the question rose whether the term "Gottesdienst," used in a contract made fifty years previously between two churches, included a Sunday school. The contract was

The sense intended at the time must be adopted.

¹ *Infra*, § 662.

² *Jackson v. Farlow*, 75 Ind. 123; *Hall v. Williams*, 13 Minn. 260; *Shaffer v. Mining Co.*, 4 Cal. 294.

³ Wh. on Ev. §§ 939, 972; *Kell v. Charmer*, 23 Beav. 195; *Sweet v. Lee*, 3 M. & G. 452; *Daintree v. Hutchinson*, 10 M. & W. 87; *Fenderson v. Owen*, 54 Me. 372; *Stone v. Hubbard*, 7 Cush. 565; *Hite v. State*, 9 Yerg. 357. As to blanks, see *supra*, § 204.

⁴ Wh. on Ev. § 926; *Eden v. Blake*, 13 M. & W. 614; *Lochett v. Nicklin*, 2

Ex. R. 93; *Amonett v. Montague*, 63 Mo. 201.

⁵ *Beach v. R. R.*, 37 N. Y. 457.

⁶ *Hutchinson v. Bowker*, 5 M. & W. 535; *Smith v. Wilson*, 3 B. & Ad. 728; *Rawlins v. Jenkins*, 4 Q. B. 49; *Mil-lard v. Bailey*, L. R. 1 Eq. 382; *Met-calf v. Taylor*, 36 Me. 28; *Adams v. Frothingham*, 3 Mass. 360; *Livingston v. Ten Broeck*, 16 Johns. 23; *Denny v. Manhattan Co.*, 2 Hill, N. Y. 220; *Slater v. Cave*, 3 Oh. St. 80.

⁷ *Wray, C. J.*, *Cro. Eliz.* 360, cited *Story on Cont.* § 805.

executed by an Evangelical Lutheran congregation, and a German Reformed congregation, for the purpose of erecting a church edifice, the edifice to be used only for "Gottesdienst." The question was whether this edifice could be used for a Sunday school. The court held it could not, since Sunday schools were not in existence in that neighborhood at the time of the formation of the contract.¹ "It is the duty of courts," so it is said by the court, "to interpret the language of written instruments; but in doing this they always follow the meaning attributed to the terms by those whose custom it is to use them. Therefore, when a contract is capable of two different interpretations, that which the parties themselves have always put upon it, and acted upon, especially as here, for a long series of years, a court will follow, because it is the true intent and meaning of the parties which are to be sought for in the language they use. However right it may be to view the Sunday school as a most useful institution in instructing youth in the knowledge and worship of God, and their duties to mankind, this praiseworthy view cannot change a written contract. . . . These congregations never so understood or acted upon their agreement of union."²—A contract to convey property at a certain place means ordinarily property owned by the promisor at that place *at the time* of the contract.³

§ 636. It is elsewhere seen⁴ that it is not admissible unless in cases where mutual mistake is shown, to prove by parol that a contract has a meaning repugnant to its terms. Latent ambiguities can be cleared by parol; but unless the document is shown clearly and plainly to be in contravention of what the parties at the time meant, or unless one party is clearly and plainly shown to have been defrauded by the other, a meaning cannot to be forced into

¹ Gass' App. 73 Penn. St. 39.

² See Littlefield *v.* Winslow, 19 Me. 394; Robinson *v.* Fisk, 25 Me. 401; Philbrook *v.* Ins. Co., 37 Me. 137. In Hatch *v.* Douglas, 48 Conn. 116, it was held that where a party uses a technical term which has a clearly defined meaning in the business to which it relates, and the other party, giving it

that meaning, acts upon it, the former cannot be permitted, to the prejudice of the latter, to say that he used it in a different sense.

³ Hurley *v.* Brown, 98 Mass. 545. As to conflict between intention and words see *supra*, § 174.

⁴ *Supra*, §§ 202 *et seq.*; *infra*, §§ 660 *et seq.*

it in opposition to its text. The same rule is applied to the definition of words. A latent obscurity in a word may be explained. But there being no obscurity, and no common mistake, and no fraud, evidence is inadmissible to show that the word was used by one of the parties in a sense peculiar to himself.¹

§ 637. When a contract is drawn at the common domicile of both parties, the law prevailing in such domicile is to determine the interpretation of the contract.² When, however, a contract is entered into in this country by foreigners, with a view of performance in their own country, then the law of the place of performance is to prevail.³ But the law of the place of solemnization does not control when it is not the personal law of the parties, or the law of the place where the contract is to be performed.⁴ The Roman law is to the same effect; the test is the place where *actum est*, or *negotium gestum est*, not where *contractum est*.⁵ Hence, the place in subordination to whose idioms a word is used is to determine the sense of that word.⁶ Thus, under a contract to carry a full and complete cargo of molasses from Trinidad to London, evidence will be received to show that by the usage of the place of loading, which was in contemplation by the parties, a cargo is full and complete if the ship be filled with casks of the standard size, though there are other casks of a smaller size freighted in the same vessel.⁷ London custom, also, is admis-

Place in subordination to whose idioms a word is used is to determine meaning of word.

¹ Wh. on Ev. §§ 1022, 1028.

⁴ Hall v. Costello, 48 N. H. 176.

² Wh. Con. of L. § 434; Story, Con. of L. § 263; Wilcox v. Hunt, 13 Pet. 378; Courtois v. Carpenter, 1 Wash. C. C. 376; Watson v. Brewster, 1 Barr, 381; Allshouse v. Ramsey, 6 Whart. 331; Benners v. Clemens, 58 Penn. St. 24; Balt. & Oh. R. R. v. Glenn, 28 Md. 287; Morris v. Eves, 11 Mart. 730.

⁵ Koch, II. 224; L. 34, D. de reg. jur.; L. 17; L. 3, D. de reg. auct. jud. (42, 5).

³ Wh. on Ev. § 960; Stebbins v. Leowolf, 3 Cush. 137; see Howard v. Ins. Co., 109 Mass. 384.

⁶ Vallance v. Dewar, 1 Camp. 503; Bottomley v. Forbes, 5 Bing. N. C. 121; Spicer v. Coopey, 1 Q. B. 424; Buckle v. Knoop, L. R. 2 Ex. 125; Eldredge v. Smith, 13 Allen, 140; Fitch v. Carpenter, 43 Barb. 40; Walls v. Bailey, 49 N. Y. 467; Barton v. McKelway, 22 N. J. L. 165.

⁷ Cuthbert v. Cumming, 11 Ex. 405.

sible to explain the usage of agents acting in London.¹ Persons, also, living and doing business in a particular community are supposed, when adopting the dialect of that community, to use it in the vernacular sense.² When a contract is entered into by correspondence, then the usage of the place of the writer who first uses the litigated words is decisive unless it appear that he accommodated himself to the usages of some other place.³ Where, however, the term is used in reference to a particular place of performance, then the meaning assigned to it in such place of performance is to prevail.⁴

§ 638. In informal documents, the plain meaning is to prevail.⁵ "Words," so it is said, "are to be construed according to their strict and primary acceptation, unless, from the context of the instrument, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect."⁶ "We ought to read the words," so it is added, "in their ordinary sense, and not to depart from it, unless it is perfectly clear from the context that a different sense ought to be put on them."⁷ Thus the term "insolvency" in a condition that a contract should terminate on the insolvency of the buyer, is held to mean inability to pay, not

¹ Johnston *v.* Usborne, 11 A. & E. 549. Dr. Lieber gives as an illustration of local meaning, "femme sage," which in France means, not "wise woman, but midwife." Horace Walpole tells of an Englishman who produced some confusion at a French party, by saying to a lady that he appealed to her as a "femme sage."

² Trimby *v.* Vignier, 1 Bing. N. C. 151; Clayton *v.* Gregson, 5 Ad. & El. 302; De la Vega *v.* Vianna, 1 B. & Ad. 284; Taylor *v.* Briggs, 2 C. & P. 525; De Wolf *v.* Johnson, 10 Wheat. 367; Bank U. S. *v.* Donally, 8 Pet. 368; Wilcox *v.* Hunt, 13 Pet. 378; Pope *v.* Nickerson, 3 Story, R. 465; Sheets *v.* Seldon, 2 Wall. 178; Hall *v.* Costello,

48 N. H. 176; Coit *v.* Ins. Co., 7 Johns. 385; Aster *v.* Ins. Co., 7 Cow. 202; Depaw *v.* Humphreys, 8 Mart. N. S. 1.

³ Wh. Con. of L. § 435; Power *v.* Whitmore, 4 M. & S. 141.

⁴ Wh. Con. of L. § 437, and cases there cited; and see Hall *v.* Costello, 48 N. H. 176.

⁵ *Supra*, § 632.

⁶ Per cur. Mallan *v.* May, 13 M. & W. 517.

⁷ Pollock, C. B., Caine *v.* Horsfall, 1 Ex. 519; adopted in Leake, 2d ed. 222; see Garrard, *ex parte*, L. R. 5 C. D. 61; Bowes *v.* Shand, L. R. 2 Ap. Ca. 455; Mallan *v.* May, 13 M. & W. 517; Fowell *v.* Tranter, 3 H. & C. 458.

technically adjudicated insolvency.¹ The word "suspended," also, in an agreement that a right of action should be suspended for a certain time, is construed not as barring suit, but merely as agreeing conditionally for a time not to sue.² "Good-will," also, whatever may be its technical meaning, is to be interpreted in reference to the actual rights possessed by the party conveying.³

§ 639. In construing informal memoranda much greater latitude is allowed in the admission of parol proof for the purpose of explanation, and extrinsic facts of all kinds may be put in evidence for the purpose of explaining phrases which are used as mere short-hand and elliptical expressions.⁴ Under this head fall the memoranda of auctioneers⁵ and brokers⁶ as well as entries consisting merely of initial letters, such as I. O. U.⁷ On the same principle, when a letter or other informal unilateral document is before the court, it is admissible, in order to get at the real meaning, to put in evidence the sense in which the writer was in the habit of using particular words,⁸ as well as to make allowance for the informality and carelessness incident to familiar private correspondence.⁹

In memoranda and private letters allowance is to be made for individual characteristics.

¹ *Parker v. Gossage*, 2 C. M. & R. 617; *Biddlecombe v. Bond*, 4 A. & E. 332.

² *Ford v. Beech*, 11 Q. B. 852.

³ *Warfield v. Booth*, 33 Md. 63. That a conjectural meaning, no matter how plausible, must give way to the obvious practical meaning, see *Great West. R. R. v. Rous*, L. R. 4 H. L. 650.

⁴ Wh. on Ev. § 926.

⁵ *Ibid.* § 922.

⁶ *Ibid.* §§ 75, 968.

⁷ Wh. on Ev. § 1337.

⁸ Wh. on Ev. § 954.

⁹ "The only safe and just rule for the interpretation and construction of private letters, is, that we discard everything which is not a bare statement of fact, or which does not carry along with it irresistible evidence of

truth. Even the statement of facts ought to be given, so as not to require any completion, on the side of the receiver of the letter, such as the letter-writer knew would be added during the perusal by the person addressed. As to everything else, the language of a private letter is so entirely founded upon the relation between its writer and the receiver, their acquaintance with each other's character, use of words, nay, sometimes with the very accent with which the writer is in the habit of pronouncing certain sentiments or words, and upon a knowledge of so many details, which, though unmentioned, serve to give the right meaning to the words, that a letter, destined to remain private, frequently changes its whole character as soon as it is made public, and when a third

§ 640. A *nomen generalissimum*, when used as such, is to be largely interpreted.¹ Thus where a document speaks of "cattle," and does not further specify, or of "machinery," and does not further specify, or of "men," and does not further specify, then "cattle" is to be construed as including all kinds of cattle,² and "machinery" as including all kinds of machinery,³ and "men" as including women and children.⁴ It is otherwise, however, when the document goes on to particularize.⁵ Thus, if the document specifies "horses" and "geldings" it would not include "mares."⁶

Nomen generalissimum to be largely construed.

II. CONSTRUCTION.

§ 641. We have already observed that, while the work of interpretation is mainly devoted to the meaning of words, appealing therefore to the critical faculties, that of construction is mainly devoted to the exposition of the sense of an entire document, appealing to the logical faculties.⁷ The rules, it is true, which are applicable to interpretation are of importance in determining questions of construction, not only because the construction of a document cannot be reached until the interpretation of its component words is settled, but because the rules bearing on interpretation, so far as they are rules of logic, bear more or less closely on construction.⁸ But the work of construction is nevertheless distinct from that of interpretation, requiring

Construction determinable by laws of logic.

person attempts to interpret whatever can be doubtful or ambiguous. The relation between two persons forms a key to their correspondence, for which nothing else can be substituted. There is a private *usus loquendi* between friends, husband and wife, members of a family, etc., which cannot be known to others." Lieber, *Hermeneutics*, 145.

¹ Wh. Cr. Pl. & Pr. §§ 209, 237; *M'Cully's Case*, 2 Lew. C. C. 272; *R. v. Spicer*, 1 C. & K. 699; *Packard v. Hill*, 7 Cow. 434; *State v. Tootle*, 2 Harring. 541; *State v. Dunnevant*, 3 Brev. 9; *People v. Soto*, 49 Cal. 69.

² See cases in Wh. Cr. Pl. & Pr. § 237.

³ *R. v. Clegg*, 3 Cox C. C. 295.

⁴ See *Packard v. Hill*, 7 Cow. 434; 5 Wend. 375.

⁵ *R. v. Cooke*, 2 East P. C. 616; *R. v. Douglass*, 1 Camp. 212; *R. v. Willard*, R. & R. 494; *Hooker v. State*, 4 Ohio, 359; *State v. Plunket*, 2 Stew. 11; *Turley v. State*, 3 Humph. 323.

⁶ *Hooker v. State*, 4 Ohio, 350.

⁷ See *supra*, §§ 627 *et seq.*

⁸ See *Railroad Companies v. Schutte*, 103 U. S. 118.

the exercise of different faculties, and subjected to different adjudications. These will now be examined.¹

§ 642. At common law, no distinct degree of validity was assigned to a written contract which was not under seal. The difference between a written and an unwritten contract, supposing the latter was unsealed, was a difference solely in degree; and in pleading it was not necessary to aver a contract, when not sealed, to be in writing, this being a mere matter of evidence.² In the old writers, written contracts are spoken of as

At common law, unsealed written contracts differ only in degree from unwritten.

¹ Dr. Lieber gives the following as the leading rules for construction (Hermeneutics, 136-7) :—

“1. All principles of interpretation, if at all applicable to construction, are valid for the latter.

“2. The main guide of construction is analogy, or rather, reasoning by parallelism.

“3. The aim and object of an instrument, law, etc., are essential, if distinctly known, in construing them.

“4. So also may be the causes of a law.

“5. No text imposing obligations is understood to demand impossible things.

“6. Privileges, or favors, are to be construed so as to be least injurious to the non-privileged or unfavored.

“7. The more the text partakes of the nature of a compact, or solemn agreement, the closer ought to be its construction.

“8. A text imposing a performance expresses the minimum, if the performance is a sacrifice to the performer; the maximum, if it involves a sacrifice or sufferance on the side of the other party.

“9. The construction ought to harmonize with the substance and general spirit of the text.

“10. The effects which would result from one or the other construction may

guide us in deciding which construction we ought to adopt.

“11. The older a law, or any text containing regulations of our actions, though given long ago, the more extensive the construction must be in certain cases.

“12. Yet nothing contributes more to the substantial protection of individual liberty than a habitually close interpretation and construction.

“13. It is important to ascertain whether words were used in a definite, absolute, and circumscribed meaning, or in a generic, relative, or expansive character.

“14. Let the weak have the benefit of a doubt, without defeating the general object of the law. Let mercy prevail if there be a real doubt.

“15. A consideration of the entire text or discourse is necessary, in order to construe fairly and faithfully.

“16. Above all, be faithful in all construction. Construction is the building up with given elements, not the forcing of extraneous matter into a text.”

That the construction must be reasonable, see *Com. Dig. Agreement, C.*; *Freeland v. Burt*, 1 T. R. 703; *Saward v. Anstey*, 2 Bing. 522; *Robertson v. French*, 4 East, 135.

² *Infra*, § 684; *Leake*, 2d ed. 169; *Seddon v. Senate*, 13 East, 74; *Young v. Austin*, L. R. 4 C. P. 553; *Corkling*

parol; all contracts not under seal, written as well as unwritten, having this title.¹ On the other hand, the word *parol*, when denoting a distinct species of evidence, is used as convertible with oral; and when we speak of *parol* evidence being received to explain a written document, we mean oral evidence.² As is elsewhere seen, secondary evidence of documents is inadmissible, no matter what phase of inferiority constitutes such secondariness;³ the general test, however, not being authority or dignity, but immediateness of relation to the object to which the document refers.⁴ Hence, no primary testimony is rejected because of faintness.⁵—So far as concerns the right to vary a document by *parol*, no distinction is now recognized between sealed and unsealed writings.⁶

§ 643. But when the question arises as to the mode of proving a contract, it is an established rule of evidence that all preliminary negotiations are to be regarded as merged in the writing which the parties have agreed on as the final expression of their views.⁷ That which is likely to have been the more deliberate form of expression, and to have been most maturely weighed by them, will be regarded as their final utterance. It is not so merely because the form selected is written while that rejected is unwritten. Cases sometimes arise in which it may appear that a word was used under mutual mistake, and in which an unwritten word may be substituted on oral proof for a written word.⁸ And cases still more frequently arise in which informal written memoranda are merged in a final unwritten contract.⁹ There is no inexorable rule, there-

v. Massey, L. R. 8 C. P. 395. A specialty, however, is supposed to be of a higher solemnity than an unsealed contract, and when an unsealed contract is succeeded by a specialty on the same subject-matter, the sealed is supposed to absorb the unsealed document. See *infra*, § 643.

¹ *Infra*, § 684.

² *Parol* evidence may be also used, as *Mr. Leake* (*Contracts*, 2d ed. 170) notices, as convertible with extrinsic

evidence, to which he cites 3 Black. Com. 367; *Taylor on Ev.* § 367.

³ *Wh. on Ev.* § 60.

⁴ *Ib.* § 71.

⁵ *Ib.* § 72.

⁶ *Ib.* §§ 930 *et seq.*; *Canal Co. v. Ray*, 101 U. S. 527.

⁷ That provisional agreements are not to be treated as final, see *supra*, § 5.

⁸ See *supra*, §§ 205 *et seq.*

⁹ *Wh. on Ev.* § 1014; *supra*, § 5.

fore, that, wherever there is oral and written proof of the same transaction, the oral is to be regarded as merged in the written. The rule is simply this, that, when a writing is signed by the parties to a contract, it is presumed, until the contrary be proved, to embody their final determination, absorbing all preliminary negotiations, whether written or unwritten.¹ On the one side, an agreement meant merely to be tentative cannot sustain a suit.² On the other side, it is competent for the parties to convert such tentative agreement into a final contract.³

§ 644. Written words may be put on the margin or in the blanks of a prepared form merely as suggestions for future consideration; and this is often the case with words written with pencil, so that the marks can afterwards be rubbed out. In such cases it is a question of fact whether the words were meant to be permanently binding.⁴ If the agreement was merely tentative, and was not intended by the parties to operate until reduced to form, then it cannot, until so reduced, sustain a suit.⁵

Writing may be on its face tentative.

§ 645. Yet it does not follow that, because the parties intend to embody their determination in a solemn writing, prior provisional agreements entered into by them are without force. On the contrary, such agreements, though consisting of mere memoranda, and meant by the parties to be superseded in future by a document elaborately drawn and engrossed, may bind effectually, if so intended, unless otherwise prescribed by statute, until the document in which it is intended they should be merged is executed.⁶ A lessor is bound by an agreement to lease notwithstanding that this agreement provides that a "proper

Provisional agreement may bind until final be executed.

¹ Leake, 2d ed. 173; Wh. on Ev. § 1014, and cases there cited; Brantom v. Griffiths, L. R. 2 C. P. D. 212; Broughton v. Mitchell, 64 Ala. 210; Blackman v. Dowling, 63 Ala. 304. That on an inchoate and imperfect agreement suit cannot be brought, see *supra*, § 5.

² *Supra*, § 5.

³ Riggins v. R. R., 73 Mo. 598.

⁴ Leake, 2d ed. 220; Lucas v. James, 7 Hare, 419; Adams *in re*, L. R. 2 Pr. 367.

⁵ *Supra*, § 5; *infra*, § 646.

⁶ Gibbins v. Asylum, 11 Beav. 1; Fowle v. Freeman, 9 Ves. 351; Crossley v. Maycock, L. R. 18 Eq. 180; Thomas v. Dering, 1 Keen, 729; and cases cited *supra*, § 5.

contract" is to be drawn by a solicitor.¹ The directors of a corporation vote to approve an agreement with a contractor, "the said agreement to be engrossed in duplicate, signed, sealed, and delivered," and the vote binds, though no such deed be executed.² A correspondence takes place between two brokers in which a sale is agreed on, the vendor saying, when accepting, "contract in due course;" and the sale is complete, although a contract afterwards forwarded by one party is rejected by the other as not accurately giving the terms agreed on.³

§ 646. But unless it contain an actual proposal and acceptance of one and the same thing, a provisional agreement has no binding force. If the terms are settled and only the form is reserved, then there is a contract, but there is no contract if terms as well as form are reserved for future settlement.⁴ An acceptance, also, if it introduces a condition varying, no matter how slightly from the proposal, which condition is to be embodied in a writing to be afterwards drawn, is inoperative.⁵

§ 647. "The construction of a contract in writing, as of all written instruments, belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts; and it is the duty of the

¹ Oxford v. Provand, L. R. 2 P. C. 135.

² Jones v. Victoria Dock Co., L. R. 2 Q. B. D. 314, cited Leake, 2d ed. 175; see *supra*, § 5.

³ Heyworth v. Knight, 17 C. B. N. S. 298; see *supra*, § 5.

⁴ *Supra*, §§ 5, 8; Leake, 2d ed. 175; Wood v. Midgeley, 5 D. M. & G. 41; Honeyman v. Marryat, 6 H. L. C. 112; Rossiter v. Miller, L. R. 5 C. D. 648; Winn v. Bull, L. R. 7 C. D. 29; and cases cited *supra*, § 5.

⁵ Crossley v. Maycock, L. R. 18 Eq. 180; *infra*, §§ 2, 8. In Crossley v. Maycock, L. R. 18 Eq. 180, Jessel, M.

R., said: "If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified, or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce."

jury to take the construction from the court; either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them."¹ And while the meaning of all disputed terms of art or business as to which testimony has to be taken is for the jury, the interpretation of the entire contract, including the terms whose meaning is thus settled, is for the court.² It is true that the functions seem sometimes almost inextricably blended. When a contract is partly written and partly unwritten, the determining what the unwritten words actually are is for the jury, on the whole evidence of the case. Yet, supposing these words to be fixed upon, and a definition as a matter of fact assigned to them, then their meaning as related to the other words of the same contract is to be determined by the court. The blending is, therefore, merely superficial, as the two functions seem readily severed.³ The jury are to determine what the contract is, and what, in case of dispute, is the interpretation of disputed words; the court is to determine what is the construction which these words, with the meaning thus established, are to have.⁴

§ 648. When a writing is lost, and parol proof is given of its contents, the province of determining the meaning of these contents remains with the court to the

So of lost document.

¹ Per cur. in *Neilson v. Harford*, 8 M. & W. 823; *Leake*, 2d ed. 218; *Di Sora v. Phillips*, 10 H. L. C. 638; see *supra*, § 631; 1 Ch. on Con., 11th Am. ed. 103; *Reuss v. Picksley*, L. R. 1 Ex. 342; *Levy v. Gadsby*, 3 Cranch, 180; *Woodman v. Chesley*, 39 Me. 45; *Randall v. Thornton*, 43 Me. 226; *Nash v. Drisco*, 51 Me. 417; *Drew v. Towle*, 10 Fost. 53; *Pratt v. Langdon*, 12 Allen, 544; *Smith v. Faulkner*, 12 Gray, 251; *Globe Works v. Wright*, 106 Mass. 207; *School District v. Lynch*, 33 Conn. 330; *Jones v. Bunker*, 83 N. C. 324; *Emery v. Owings*, 6 Gill, 191; *Collins v. Banbury*, 5 Ired. 118.

² *Supra*, § 631; *Short v. Woodward*, 13 Gray, 86; *Festerman v. Parker*, 10 Ired. 477; *McAvoy v. Long*, 13 Ill. 147.

³ See *Guptill v. Damon*, 42 Me. 271; *Globe Works v. Wright*, 106 Mass. 216; *Rapp v. Rapp*, 6 Barr, 45; *Edwards v. Goldsmith*, 16 Penn. St. 43.

⁴ *Supra*, § 631; *Moore v. Garwood*, 4 Exch. 681; *Brown v. Orland*, 36 Me. 376; *Globe Works v. Wright*, 106 Mass. 216; *Short v. Woodward*, 13 Gray, 86; *Bomeisler v. Dobson*, 5 Whart. 398; *Hooper v. Webb*, 27 Minn. 485.

same effect as if the written document were restored, reserving, however, to the jury the determination of the question how far, as a matter of fact, the meaning of the lost writing is reproduced.¹

§ 649. The rules of construction, which are adopted in courts of law, are substantially adopted in courts of equity.² There is this important distinction, however, to be observed. The burden is on the *actor*, or the person bringing a suit, to make out his case. When a contract is ambiguous, therefore, then a party seeking to have it specifically performed might have a decree against him, while the other party, if seeking to rescind it, might also fail in making out a case. In other words, unless a case requiring relief is made out, an agreement will not be either enforced or rescinded.³ A court of equity, also, will grant relief, in defiance of the grammatical construction in all cases of bonds with penalties. This, however, is based, not on rules of construction, but on the principle that only what is due is to be paid.

§ 650. Whether a document was meant to be an escrow; whether it was obtained by fraud; whether it was obtained only conditionally; whether it was meant to be a mere project, without binding effect;—these are all questions which parol evidence is admissible to determine.⁴ But as a matter of law, the construction of the document is for the court.⁵ Whether a stipulation is a condition depends upon the intention of the parties;⁶ but in collecting this intention, the whole context is to be examined.⁷—When acts are made reciprocally dependent, a party suing for non-performance must aver readiness to perform, or performance.⁸

§ 651. Although in old manuscripts it was not usual to insert punctuating marks, and although in England it is still not usual to insert such marks in either statutes or deeds, yet when they are used, they will be taken

¹ *Berwick v. Horsfall*, 4 C. B. N. S. 450; *Moore v. Holland*, 39 Me. 307.

² *Leake*, 2d ed. 217; *Ch. on Con.* 11th Am. ed. 104; *Scott v. Liverpool*, 3 De G. & J. 334; *Eaton v. Lyon*, 3 Ves. 692.

³ *Infra*, §§ 654 *et seq.*

⁴ *Wh. on Ev.* §§ 927 *et seq.*

⁵ See fully *supra*, §§ 553 *et seq.*; *Leake*, 2d ed. 219.

⁶ *Supra*, § 554.

⁷ *Supra*, § 555.

⁸ *Supra*, § 558.

into account in determining the meaning of the document into which they are introduced.¹ False punctuation, however, may be overridden, when this is requisite to bring out the true sense; and if there be no punctuation, the proper inflections will be supplied by the court.²—Parol proof is admissible to prove the meaning of points.³—But sense is not to be sacrificed to punctuation when used carelessly or ignorantly.⁴

§ 652. Whether, when a document is partly written and partly printed, the writing and the printing stand on the same footing, has been much discussed.⁵ The prevalent opinion is, that as the writing ordinarily constitutes the *differentia* of a case, it is, in a case of conflict, when by so doing the general sense of the document can be maintained, to be regarded as overriding the printed context.⁶ “The written words are the immediate language and words selected by the parties themselves for the expression of their meaning, and the printed words are a general formula, adapted equally to their case and that of all other contracting parties on similar occasions.” “The language of printed blanks is easily assumed to be appropriate, without careful examination, while the written words more safely and more nearly indicate the intention of the contracting parties.”⁸ It has therefore been held that “the part that is specially put into a written instrument is naturally more in harmony with what the parties are intending than the other, although it must not be used to reject the other, or to make it have no effect.”⁹

Writing
distinctively
effective
as compared
with
print.

¹ Leake, 2d ed. 221; Gauntlett v. Young v. Grote, 4 Bing. 253; Nicoll v. Carter, 17 Beav. 586; Caston v. Brock, Ins. Co., 3 Wood. & M. 529; Hernandez v. Ins. Co., 6 Blatch. 317; Benedict v. Ins. Co., 31 N. Y. 397; Hill v.

² See Willis v. Martin, 4 T. R. 65.

³ Graham v. Hamilton, 5 Ired. L. 428.

⁴ White v. Smith, 33 Penn. St. 186; Osborn v. Farwell, 87 Ill. 89.

⁵ See Wh. on Ev. § 925; Wood on Ins. 148; Flanders on Ins. 70; May on Ins. § 184; Magee v. Lavell, L. R. 9 C. P. 113; Gumm v. Tyrie, 6 B. & S. 298.

⁶ Robertson v. French, 4 East, 136;

Miller, 76 N. Y. 32; Clark v. Woodruff, 83 N. Y. 518; People v. Dulaney, 96 Ill. 503.

⁷ Per cur. in Robertson v. French, 4 East, 136.

⁸ Finch, J., Clark v. Woodruff, 83 N. Y. 523.

⁹ Blackburn, J., Joyce v. Ins. Co., L. R. 7 Q. B. 583; Dudgeon v. Pembroke,

§ 653. The practice of parties to a contract, also, may give the basis on which its construction may rest. "Tell me," says Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what that deed means."¹ Hence, the acts and declarations of parties, constituting their mode of doing business, is strong evidence of the meaning they assigned to contracts made by them.²

§ 654. If a contract is open to two probable constructions, one of which would impute fraud or illegal purpose to one of the parties, while the other construction would be free from such taint, the latter construction will be adopted.³ Hence, when there are two conflicting local laws, according to one of which the contract would be inoperative, while according to the other it would be operative, the contract will be held to have been made under the latter law, since it will not be presumed that one party intended to cheat the other by a sham and fraudulent contract.⁴ When by one construction, also, a contract would be void, and by another it would be operative, the latter will be preferred.⁵—"If words have been used of any

L. R. 2 Ap. Ca. 284; S. P., *Elkins v. Trans. Co.*, 2 Weekly Notes, 403.

See as sustaining text, *Steinbach v. Ins. Co.*, 54 N. Y. 90; *Niagara Ins. Co. v. De Groff*, 12 Mich. 124; *Goss v. Ins. Co.*, 18 La. An. 97.

¹ *Atty.-Gen. v. Drummond*, 1 Dr. & W. 353, 366; aff. on app. *Drummond v. Atty.-Gen.*, 2 H. of L. Cas. 837.

² *Weld v. Hornby*, 7 East, 199; *Shore v. Wilson*, 9 Cl. & F. 569; *Archer v. Dunn*, 2 W. & S. 327; *Pratt v. Campbell*, 24 Penn. St. 184; *Lehigh Coal Co. v. Harlan*, 27 Penn. St. 429; and other cases cited Wh. on Ev. § 941; and see *infra*, § 709.

³ Wh. on Ev. § 1248; *Best's Ev.* §§ 346-7; *Shore v. Wilson*, 9 Cl. & F. 397; *Moss v. Bainbrigge*, 18 Beav. 478; *Lorillard v. Clyde*, 86 N. Y. 384; *Young v. Edwards*, 72 Penn. St. 267;

Mendal v. Mendal, 28 La. An. 556; *Bumpus v. Tisher*, 26 Tex. 561; and see cases cited *supra*, §§ 337, 462.

⁴ Wh. on Ev. § 1250; Wh. Con. of L. §§ 112, 115, 429, 501; *Hellman's Will in re*, L. R. 2 Eq. 363; *Cromwell v. Sac*, 96 U. S. 51; *Cutler v. Wright*, 22 N. Y. 472; *Kilgore v. Dempsey*, 25 Oh. St. 413; *Kenyon v. Smith*, 24 Ind. 11; *Smith v. Whitaker*, 23 Ill. 367; *Talbott v. Trans. Co.*, 41 Iowa, 249; and cases cited Wh. Con. of L. § 429.

⁵ *Wilkinson v. Gaston*, 9 Q. B. 137; *Russell v. Phillips*, 14 Q. B. 891; *Watson v. Pears*, 2 Camp. 296; *Haigh v. Brooks*, 10 A. & E. 309; *Goldshede v. Swan*, 1 Ex. 154; *Richards v. Bluck*, 6 C. B. 441; *Atkins v. Horde*, 1 Binn. 106; *Simpson v. Vaughan*, 2 Atk. 32; *Lewis v. Davidson*, 4 M. & W. 654; *Shore v. Wilson*, 9 Cl. & F. 397; *Ire-*

ambiguity," said Lord Cairns, in a celebrated case, "or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given, which will make the contract a legitimate and valid one, and not that construction by which the contract will be destroyed."¹ — "We are not allowed," said Adams, C. J., in the supreme court of Iowa, in 1881, "to so construe a contract as to deprive it of all force, if it is susceptible of any other reasonable construction."² In construing a consideration, also, the courts, when consistent with legal rules, will give it the meaning most conducive to good faith.³

§ 655. Hence, when a contract has a primary meaning, which is ineffectual, from want of some technical requisite, and a secondary meaning, virtually to the same effect, which has no technical obstacle in its way, the latter meaning will be adopted by the courts.⁴ Thus a deed of bargain and sale, which is inoperative in consequence of failure to enrol, will be construed as a grant of its reversion.⁵ A conveyance, inoperative as a conveyance in fee, also, may be made effective as a declaration of trust.⁶ Equity, also, will relieve when fraud, after a *bona fide* agreement, is employed

Legal meaning, if possible, will be assigned.

land v. Livingston, L. R. 5 H. L. 395; Marsh v. Whitmore, 21 Wall. 178; Patrick v. Grant, 14 Me. 233; Thrall v. Newall, 19 Vt. 202; Mech. Bk. v. Merch. Bk., 6 Met. 13; Brewer v. Hardy, 22 Pick. 376; Foster v. Rockwell, 104 Mass. 167; Bryan v. Bradley, 16 Conn. 474; Bickford v. Cooper, 41 Penn. St. 142; Cobb v. Fountaine, 3 Rand. 487; Bessent v. Harris, 63 N. C. 572; Long v. Pool, 68 N. C. 479; Evans v. Sanders, 8 Port. 497; Goosey v. Goosey, 48 Miss. 210.

¹ Muir v. Glasgow Bk., cited Wh. on Ev. § 1249.

² Wing v. Glick, Sup. Ct. Iowa, 1881. That the sense is to be that which the promisor apprehended at the time that the promisee received the promise, see *supra*, § 657.

³ Oldershaw v. King, 2 H. & N. 120;

Hamaker v. Eberley, 2 Binn. 509; Payne v. Wilson, 17 B. & C. 423; Caldwell v. Heitscher, 9 W. & S. 53.

⁴ *Supra*, § 337; Wood v. Leadbitter, 13 M. & W. 845; Shore v. Wilson, 9 Cl. & F. 397; Inglis v. Snug Harbor, 3 Pet. 117; Wallis v. Wallis, 4 Mass. 135; Jackson v. Phillips, 14 Allen, 556; Barrett v. French, 1 Conn. 354; Rogers v. Ins. Co., 9 Wend. 611; Many v. Iron Co., 9 Paige, 188; Evans v. Sanders, 8 Port. 497; Riley v. Vanhouten, 4 How. (Miss.) 428; as to *cy pres* see Bisph. Eq. §§ 126 *et seq.*; as to usury see *supra*, § 462.

⁵ Smith v. Frederick, 1 Russ. 174; Lynch v. Livingston, 6 N. Y. 422.

⁶ See Price v. Dyer, 17 Ves. 356; Sprigg v. Bank, 14 Pet. 201, and other cases cited Wh. on Ev. § 1031.

to prevent the execution of the agreement in conformity with the statute of frauds.¹

§ 656. Another important rule of construction is "that when a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized, because he meant it to be read in the other sense, of which it is equally capable."²

§ 657. As in a contract a concurrence of minds to one and the same thing is necessary, it is essential, in construing a written contract, to determine what was the thing as to which the parties concurred.³

The real meaning must, therefore, be sought under the formal; the intent must be gathered from the words.—And as no contracts are, both in words and surroundings, precisely the same, each contract is to be determined on its own specific conditions, subject to such general rules of interpretation as the parties may be presumed to have themselves recognized in selecting the words they used.⁴ To aid in understanding, in all cases of latent obscurity, what was the interpretation of the parties, extrinsic facts may be put in

¹ Wh. on Ev. § 911. When the intention can in no other way be executed, provisions and conditions will be construed as covenants; *Huff v. Nickerson*, 27 Me. 106; and exceptions in a lease have been construed to be a grant of a right. 2 *Parsons*, 54, citing, *Wickham v. Hawker*, 7 M. & W. 63.

² *Blackburn, J., Ireland v. Livingston*, L. R. 5 H. L. 395; adopted and approved in *Benj. on Sales*, 3d Am. ed. 576; *De Tastett v. Crousset*, 2 Wash. C. C. 132; *Loraine v. Cartwright*, 3 Wash. C. C. 151; *Courcier v. Ritter*, 4 Wash. C. C. 551.

³ See *supra*, §§ 3, 4.

⁴ *Infra*, §§ 827–8; *Aguilair v. Rodgers*, 7 T. R. 423; *Doe v. Worsley*, 1 Camp.

20; *Shore v. Wilson*, 9 C. & F. 355; *McConnel v. Murphey*, L. R. 5 P. C. 219; *Aspden v. Seddon*, L. R. 10 Ch. 377; *Southwell v. Bowditch*, L. R. 1 C. P. D. 377; *Lawrence v. McCalmont*, 2 How. U. S. 449; *Bell v. Bruen*, 1 How. U. S. 426; *Nash v. Towne*, 5 Wall. 689; *Robinson v. Fiske*, 25 Me. 401; *Gunnison v. Bancroft*, 11 Vt. 493; *Hopkins v. Young*, 11 Mass. 202; *Quackenboss v. Lansing*, 6 Johns. 49; *Wilson v. Troup*, 2 Cow. 195; *Clark v. Woodruff*, 83 N. Y. 518; *Stroecker v. Bank*, 6 Barr, 41; *Reed v. Lewis*, 74 Ind. 433; *Spencer v. Millisack*, 52 Iowa, 31; *Balch v. Ashton*, 54 Iowa, 123; *Anderson v. Holmes*, 14 S. C. 162.

evidence.¹ Thus the word “and” will be construed as if it were “or” when necessary to make out the sense;² though not when either reading will be consistent with an intelligent construction.³—The test, as has been well observed by Dr. Paley, as adopted by Mr. Chitty,⁴ “is not the sense in which the promisor actually intended it, . . . because at that rate, you might excite expectations which you never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements you never designed to undertake. It must, therefore, be in the sense (for there is none other remaining), in which the promisor believed that the promisee accepted the promise.”⁵ Chancellor Kent speaks substantially to the same effect:—“The true principle of sound ethics is to give the contract the sense in which the person making the promise believes the other party to have accepted it.” And he adds, that “the modern and more reasonable practice is to give the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting the rule of a rigid or an indulgent construction.”⁶ In this view, promises understood by both parties to be in jest are inoperative.⁷ The Roman law takes the same position. “In conventionibus contrahentium voluntatem potius quam verba spectari placuit. Cum igitur ea lege fundum vestigalem municipes locaverint, ut ad heredem ejus qui suscepit pertineret, jus heredum ad legatarium quoque transferri potuit.”⁸ “Cum . . . manifestissimus est sensus testatoris, verborum interpretatio nusquam tantum valeat, ut melior sensu existat.”⁹

¹ *Supra*, § 630; *infra*, §§ 661, 827–8; Wh. on Ev. §§ 920 *et seq.*; Ricker v. Fairbanks, 40 Me. 43.

² *Maynard v. Wright*, 26 Beav. 285.

³ *Seccombe v. Edwards*, 28 Beav. 440.

⁴ Ch. on Con. 11th Am. ed. 104.

⁵ This passage is adopted by Bronson, J., in *Potter v. Ins. Co.*, 5 Hill, 147; and, also, in *White v. Hoyt*, 73

N. Y. 505; *supra*, § 654; and as taking the same view, see remarks of Blackburn, J., *infra*, § 670.

⁶ 2 Kent, Com. 557.

⁷ *Supra*, § 175.

⁸ L. 219, D. de V. S. 50–16.

⁹ L. 3, C. de lib. pract. (6. 28). See generally, Ihering, *Jahr. f. Dogm.* IV. p. 72. That a contract must have a definite meaning, see *supra*, § 3.

§ 658. When, however, the words of a contract have a clear and consistent meaning, and when no mistake or fraud is set up, the intention of the parties cannot be proved for the purpose of overriding this meaning. To intention expressed solemnly in a contract, intention proved orally is to yield in all cases in which fraud or mistake is not established. Many persons are chary and intentionally enigmatical in expressing their real intentions. Others like to hint at tentatory schemes which they have no fixed purpose of realizing; others like to mystify, sometimes from policy, sometimes from habit, sometimes from cynicism. Then, again, my intention a moment ago, and that which I declared to be my intention, may not be my intention now. The mind changes rapidly; caprice, or a new though sudden light, may bring about a real and instant change of my purposes. Or, supposing my mind remains unchanged, to permit my private intention to overrule the natural and obvious meaning of my written engagement, would be to give to secret mental reservations an ascendancy destructive of fair business dealing. And, even supposing there be no such taint, to permit the treacherous medium of memory as to conversation to supersede the more exact and more loyal medium of a written statement, is to subordinate the more trustworthy to the less trustworthy mode of proof.¹

§ 659. But when a description in a document is equally applicable to two or more objects, the declaration of the author may be received to explain to which of these objects the description refers. The subject matter of a contract may be shown by parol evi-

But supposed intent not to be introduced to override words.

Otherwise as to ambiguous terms.

¹ *Shore v. Wilson*, 9 Cl. & F. 525; *Kirk v. Hartmann*, 63 Penn. St. 97; *Peel in re*, L. R. 2 P. & D. 46; *Great W. R. R. v. Rous*, L. R. 4 H. L. 650; *Woodell v. Greater*, 51 Ind. 539; *McHunt v. Rousmanier*, 8 Wheat. 174; *Cormick v. Huse*, 66 Ill. 315; *Hartford Ins. Co. v. Webster*, 69 Ill. 392; *Pilmer v. Bank*, 16 Iowa, 321; *Turner v. Wilcox*, 54 Ga. 593; *Sanford v. Howard*, 29 Ala. 684; and other cases cited Wh. on Ev. § 937. As to conflict between thought and word, see *supra*, § 174.

dence of the surrounding circumstances.”¹ The object is, not to create a new agreement for the parties, but to determine to what extrinsic facts the agreement made by them relates. It should be remembered, however, that while a “latent” or objective ambiguity, *i. e.* doubt as to which of several objects the parties mean, may be cleared by extrinsic testimony, it is otherwise with “patent” or subjective ambiguity, *i. e.* doubt as to whether the parties had any specific meaning. The courts may declare to what objects certain terms relate. But they cannot introduce objects the parties did not intend. In other words, the courts may determine to what thing a contract relates, but by the parties alone can the contract be made.²—The provisions of the Roman law are to the same effect. “Cum in verbis nulla ambiguitas est, non debet admitti voluntas questio.”³ “Non aliter a significatione verborum recedi oportet, quam cum manifestum est, aliud sensisse testatorem.”⁴—At the same time when a word is left out by mistake, it will be inserted if the context supplies the material.⁵

§ 660. As is elsewhere more fully shown,⁶ it may be proved by parol that the parties to a contract have agreed to collaterally extend it in a mode not inconsistent with its written terms, and that what may be thus done by direct agreement may be done indirectly by force of usage to which the parties may be supposed to have acceded.

Customary incidents may be annexed by parol.

§ 661. When a contract consists of mere memoranda, and though intended to be final, is rather to be regarded as a short-hand statement of the intention of the parties than as an exact expression of that intention, it may be helped out by parol proof.⁷ The mere fact that in itself it is incomplete does not make it inoperative.⁸ This is the case even under the statute of

Parol evidence admissible to explain, rectify, and rescind.

¹ Bradley, J., *Peck v. U. S.*, 102 U. S. 65; Wh. on Ev. §§ 939 *et seq.*, and cases there cited.

² Wh. on Ev. § 958. As to rectification, see *supra*, § 205.

³ L. 25, § 1, D. de leg. 32.

⁴ L. 69 pr. eod.

⁵ *Coles v. Hulme*, 8 B. & C. 568; El-

liott's case, 2 East P. C. 951; *Ferguson v. Harwood*, 7 Cranch, 414, and cases cited 1 Ch. on Con. 11th Am. ed. 107.

⁶ Wh. on Ev. §§ 969, 1026.

⁷ *Supra*, §§ 202 *et seq.*; *infra*, § 910.

⁸ See Wh. on Ev. §§ 922 *et seq.*, and see *supra*, §§ 5 *et seq.*

frauds. "A general description of the estate, *e. g.* Mr. O.'s house, or my house, or the properties in Cable street, or the house in Newport, or the intended new public house at Putney, or the premises, is sufficient, if parol evidence can be produced to show what property was intended."¹ Such evidence, however, is admissible to explain, not ²(unless mutual mistake be set up) to contradict the terms of the document.² If mutual mistake be alleged, it is admissible, as we have seen,³ to prove, in cases where no statute is in the way, what was the contract the parties really intended to make, and this rule applies to contracts under seal as well as to other contracts.⁴ But the evidence of mutual mistake must be strong and clear, and that of the contract to be substituted plain. It must always be remembered that the court cannot make a contract for the parties. This can only be done by themselves.⁵ At the same time, to show what the parties meant, customary incidents may be proved. But a custom, to be admissible in evidence, must be brought home to the party against whom it is offered,⁶ nor can it make a contract which the parties did not make. Its only office is to bring out what was meant.⁷ Words, also, cannot, as a mode of construction, be interpolated. If a concurrent mistake has been made, correction is to be effected by process of rectification.⁸ It cannot be done by conjectural emendation by a court.⁹—

¹ Dart, V. & P. 5th ed. 219, adopted by Baggallay, J., in *Shardlow v. Colterell*, L. R. 20 Ch. D. 280; Sugden, V. & P. 14th ed. 134, citing *Bleakley v. Smith*, 11 Sim. 150; *Ogilvie v. Foljambe*, 3 Mer. 53. See *supra*, §§ 630 *et seq.* Other cases are cited *supra*, §§ 202 *et seq.* That a contract is to be viewed in the light of surrounding circumstances, see *Farnsworth v. Boardman*, 131 Mass. 115.

² Wh. on Ev. §§ 922 *et seq.*; *supra*, §§ 202, 205, 601; *Bishop v. White*, 68 Me. 104; *Stewart v. Cambridge*, 125 Mass. 102; *Brown v. Brooks*, 25 Penn. St. 210; *Williamson v. McClure*, 37 Penn. St. 402; *Allison's App.*, 77 Penn.

St. 221. See *Maxwell v. Thompson*, 15 S. C. 612. As to rectification in case of fraud or mistake, see *supra*, §§ 205 *et seq.*; *infra*, § 910.

³ *Supra*, § 205.

⁴ *Canal Co. v. Ray*, 101 U. S. 522; *supra*, § 642.

⁵ *Supra*, §§ 205, 601; *infra*, § 910; Wh. on Ev. § 1019; *Canal Co. v. Ray*, 101 U. S. 522; *Smith v. Emerson*, 126 Mass. 169. As to parties, see § 804.

⁶ Wh. on Ev. § 962; *Harris v. Tumbridge*, 83 N. Y. 92.

⁷ *Tilley v. Cook*, 103 U. S. 155.

⁸ See *supra*, §§ 205 *et seq.*

⁹ *Frazier v. Monroe*, 72 Penn. St. 166.

Supposing there be no statutory impediment in the way, it is competent for the parties to a written agreement, at any time before its breach, or before vested rights are acquired under it, to rescind it, or to remodel it by parol; and in the latter case the reciprocal rights of the parties will subsequently be determined by putting together the new parol terms with what remains of the old. To deny this right to reconstruct would involve a *petitio principii*. The agreement, it is alleged, cannot be altered, because it is binding, and it is binding because it cannot be altered. But, as a matter of fact, the binding force of all agreements, no matter how solemn, falls back on parol proof. No document, strictly speaking, proves itself. When a document is said to prove itself, all that is meant is that the court takes judicial notice that it is properly executed, but the court takes this notice because the judges composing the court have learned, originally by parol, that the seal or other verification attached to the document is genuine. There is no document, therefore, whose genuineness is not ultimately to be decided by parol proof; and to assume that a contract before us cannot be affected by parol proof is to assume that it is a binding contract, which is the very point in dispute.¹—It is true that there may be statutory modifications of this rule, and where such modifications are made they are, as far as practicable, to be enforced. Thus under the statute of frauds, requiring that agreements for certain purposes must be in writing, an agreement duly written under the statute cannot be emptied of its contents and new conditions inserted by parol. It would be equivalent to saying that when a statute provides that no goods should pass a custom-house inspection unless the box be sealed by the proper officer, it would be allowable, as soon as a box was sealed, to empty it of one lot of goods and fill it with another. And in addition to the violation of law implied in this, it must be remembered that the object of the statute of frauds is to prevent parol agreements of the particular class, and an agreement would be none the less parol because it is grafted on a written

¹ Wh. on Ev. § 1017. As to discharge of old contract by adoption of new, see *infra*, §§ 852 *et seq.*; 1040.

document of which only its formal parts remain.¹ The degree of the modification is of no consequence; it is enough to preclude parol proof of a change that it creates in some respect a new agreement. Thus parol evidence cannot be received, under the statute of frauds, of a change in a written contract of the mode of delivery;² of an extension of the time of delivery;³ of a waiver of title to part of the land conveyed;⁴ of a change of "quarterly" for "annual" in a written contract for employment on payment of salary.⁵ Nor will parol modifications of a writing duly executed under the statute of frauds be regarded with any more favor by a court of equity than they are by courts of law.⁶—To the rule that a contract good under the statute of frauds cannot be remodelled by parol by the introduction of new terms, an exception is made in equity in cases where the parol agreement has been partially performed. In such case a party accepting and acting on the terms as altered, cannot retain his part of the fruits of the contract without returning their consideration.⁷ But while a statutory contract cannot be changed by parol in a way the statute forbids, it may be rescinded by parol. Like all other contracts, its inception must primarily be established by parol; like all other contracts, it may be rescinded by parol. This is a logical necessity which no statute can preclude, since even the statute itself ultimately must fall back on parol for its proof, and of repeal of the statute parol must be the ultimate proof. A statute may say that a contract is to be proved by a writing, and that the writing is to be proved by the signature, but as the signature has to be proved by parol, so parol may prove that the signatures were cancelled by the parties, or that the parties agreed that the contract should be no longer in force.⁸

¹ Wh. on Ev. §§ 901 *et seq.*; *Noble v. Ward*, L. R. 2 Ex. 135; *Sanderson v. Graves*, L. R. 10 Ex. 234; *Plevins v. Downing*, L. R. 1 C. P. D. 220.

² *Moore v. Campbell*, 10 Ex. 323.

³ *Steed v. Dunbar*, 10 A. & E. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Plevins v. Downing*, L. R. 1 C. P. D. 220.

⁴ *Goss v. Nugent*, 5 B. & Ad. 58.

⁵ *Giraud v. Richmond*, 2 C. B. 835.

⁶ *Leake*, 2d ed. 797; *Snelling v. Thomas*, L. R. 17 Eq. 303.

⁷ Wh. on Ev. § 909.

⁸ *Leake*, 2d ed. 799; Wh. on Ev. § 909; *Price v. Dyer*, 17 Ves. 363.

§ 662. A contract is to be interpreted as a whole, and a meaning involving the consideration of all its stipulations is to be ascertained.¹ “It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentis et consequentibus*. Every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.”² Even an isolated clause must be judged by the context, since it is only by the context that the full sense of the clause can be known.³ Hence a memorandum endorsed on the margin of a policy is to be taken into consideration in construing the policy.⁴—It is not essential, in order to take into consideration the whole document, that it should be construed grammati-

Whole context is to be taken into consideration.

¹ Parkhurst v. Smith, Willes, 332; Browning v. Wright, 2 Bos. & Pul. 13; Barton v. Fitzgerald, 15 East, 541; Nind v. Marshall, 1 Br. & B. 319; Sicklemore v. Thistleton, 6 M. & S. 12; Miller v. Travers, 8 Bing. 244; Richards v. Bluck, 6 C. B. 437; Washburn v. Gould, 3 Story, 162; Patrick v. Grant, 14 Me. 233; Chase v. Bradley, 26 Me. 531; Nettleton v. Billings, 13 N. H. 446; Wheelock v. Freeman, 13 Pick. 167; Field v. Woodmansey, 10 Cush. 431; Pembroke Iron Co. v. Parsons, 5 Gray, 589; Talbot v. Heath, 126 Mass. 139; Smith v. Emerson, 126 Mass. 169; Rolker v. Ins. Co., 3 Keyes, 17; Butterfield v. Cooper, 6 Cow. 48; Edelman v. Yeakel, 27 Penn. St. 26; Allison's App., 77 Penn. St. 221; Hopkins v. Sanford, 38 Mich. 611; Drake v. Vorse, 52 Iowa, 417; Sanger v. Dun, 47 Wis. 615; Wheeler, etc., v. Gallivan, 10 Neb. 313; see Wharton v. Fisher, 2 S. & R. 178; Ludwig v. Leonard, 9 W. & S. 144; Tate v. Tate, 75 Va. 522; and see Money Penny v. Money Penny, 3 De G. & J. 572, for a full consideration of the rule by Lord Chelmsford. That this is the case in construing conditions, see *supra*, § 555. In Dodd v. Mitchell,

77 Ind. 388, it was held that a word plainly omitted from a written contract by inadvertence will always be supplied to accomplish justice by enforcing the intention of the parties. See *supra*, § 210.

² Lord Ellenborough, Barton v. Fitzgerald, 15 East, 54.

³ Stavers v. Curling, 3 Scott, 740.

⁴ Bell v. Ins. Co., 8 S. & R. 98. In Hutley v. Marshall, 46 L. T. N. S. 186, the suit was on the following engagement: “Witness, John Hutley, Rivenhall, Oct. 2, 1860. Three months’ notice I promise to pay Mr. Jonathan Hutley interest 5*l.* per cent. per annum for 500*l.* value received. Dan Marshall, Charles Marshall. [5*s.* stamp.] 500*l.*” It was admitted that, upon the 2d Oct., 500*l.* was advanced by Jonathan Hutley to Dan Marshall, and that Charles Marshall, the defendant, signed as surety for his brother. It was held that this was a good promissory note for 500*l.*; and it was ruled that, where the words in the body of a note are ambiguous, the figures at the bottom of the note and the stamp may be looked at in construing them.

cally. The old system of conveyancing was so cumbrous and complex as to make accurate grammatical arrangement almost impossible; and it would destroy the efficacy of many informal memoranda involving large business interests if ungrammatical clauses were to be rejected. Hence, in order to carry out the intent, the meaning will be collected from the whole document without regard to its grammatical construction.¹ “We regard the rule as well settled, that when the contract or promise is unilateral, and the body of the contract fails, for any reason, to express the agreement between the parties, and a memorandum is made upon the same paper, either upon the margin or at the foot, above or below the signature of the promisor, or endorsed upon the back, and delivered with and as part of the contract, the whole instrument constitutes but one contract, and the memorandum is as much part of it as if written in the body of it.”² And when one part of a contract, by a literal construction, would abrogate other parts, such a liberal construction should be adopted as would give effect to the entire document.³

§ 663. An agreement may be collected from the entire document in which it is contained, and requires, unless prescribed by statute, no special technical terms to give it effect.⁴ Thus a covenant to plough certain leased premises except a sheep walk, has been held to be a covenant not to plough the sheep walk.⁵ A

Technical terms to be subordinated to context.

¹ See *Clifford v. Watts*, L. R. 5 C. P. 577; *Northumberland v. Errington*, 5 T. R. 526; *Finch's case*, 6 Rep. 39; *Morgan v. Gath*, 3 H. & C. 748; *Staniland v. Hopkins*, 9 M. & W. 178; *Gray v. Clark*, 11 Vt. 583; *Nettleton v. Billings*, 13 N. H. 446; *M'Quiston v. Board*, 88 Penn. St. 29; *Sapp v. Phelps*, 92 Ill. 588; *Greenville R. R. v. Johnson*, 8 Baxt. 332.

² *Libbey, J., Littlefield v. Coombs*, 71 Me. 111, citing *Tuckerman v. Hartwell*, 3 Me. 147; *Johnson v. Heagan*, 23 Me. 329; *Heywood v. Perrin*, 10 Pick. 228; *Benedict v. Cowden*, 49 N. Y. 396.

³ *Hazleton Co. v. Buck Mountain Co.*, 57 Penn. St. 301.

⁴ *Supra*, § 641; *Pordage v. Cole*, 1 Wms. Saund. 319 b; *Daniels v. Harris*, L. R. 10 C. P. 8; *Lee v. Lee*, L. R. 4 C. D. 175; *Brookes v. Drysdale*, L. R. 3 C. P. D. 52; *Marler v. Tommes*, L. R. 17 Eq. 8; *Jackson v. R. R.*, L. R. 7 C. D. 573. So the Roman law; L. 50; § 3, D. de legat. 1; “item earum, quae pracedunt vel quae sequuntur, summarum scripta sunt spectanda.”

⁵ *St. Albans v. Ellis*, 16 East, 352. As to construction of covenants, see *supra*, §§ 555 et seq.

lease with a covenant by the lessee to keep in repair a house, "being previously put in repair," includes a covenant by the lessor to put the house in repair.¹ A covenant to pay a share of the profits of a certain business for three years, to one from whom it was purchased, implies a covenant to remain in the business for three years.² A recital, also, may involve a covenant.³ Thus, a recital in a composition deed, that the debtor had agreed to pay a specified composition to all his creditors, has been held to amount to a covenant on which a creditor could sue.⁴ But words of mere qualification are not to be strained into an agreement.⁵ Thus, where a lease contained a covenant not to assign without the lessor's consent, such "consent not being arbitrarily withheld," this was construed not to imply a covenant by the lessor not to arbitrarily withhold his consent from an assignment.⁶ And no covenant can be implied from a recital if the deed contains an express covenant concerning the subject matter to which it is sought to apply the implied covenant.⁷

§ 664. When large and sweeping terms are used in documents as matters of formal conveyancing, the whole context is to be taken into consideration, and these expressions are to be narrowed to their object. A grantor conveys "all my estate" . . . "in B.," etc. If we take "all my estate" and sever it from the context, his entire property might pass under the deed. But "all my estate" cannot be severed from "in B.," etc. This is an extreme case, but there are innumerable instances in which the same principle is applied.⁸ Thus the condition of a bond

General
terms to
yield to
special.

¹ *Cannock v. Jones*, 3 Ex. 233.

² *M'Intyre v. Belcher*, 14 C. B. N. S. 654; *Marler v. Tommes*, L. R. 17 Ex. 8.

³ *Sampson v. Easterby*, 9 B. & C. 505.

⁴ *Brooks v. Jennings*, L. R. 1 C. P. 476.

⁵ *Wolveridge v. Steward*, 1 C. & M. 657. That an agreement must be definite, see *supra*, § 3.

⁶ *Treloar v. Bigge*, L. R. 9 Ex. 151;

see *Hyde v. Warden*, L. R. 3 Ex. D. 72.

⁷ *Young v. Smith*, L. R. 1 Ex. 180.

⁸ See *Cullen v. Butler*, 5 M. & S. 461; *Ellery v. Ins. Co.*, 8 Pick. 14; *Callen v. Hilty*, 14 Penn. St. 286; *Edelman v. Yeakel*, 27 Penn. St. 26; *Allison's App.*, 77 Penn. St. 221; *Perrin v. Ins. Co.*, 11 Ohio, 147. That general covenants of title yield to special, see *supra*, § 553.

is ordinarily limited by its recitals.¹ General words of conveyance, also, are to be restricted by recitals showing that it was only a limited title that was conveyed.² The words "full power to convey," also, in a recital are to be qualified by the express powers and covenants which follow.³ And, as a general rule, "where a recital is followed by general words, the general words will be limited or qualified by the recital."⁴

§ 665. When several documents are so reciprocally dependent that the meaning of the one cannot be brought out without the introduction of the other, then they may be received together as affording a common basis for construction.⁵—When one of a series of letters cannot be understood without the study of the whole series, then the whole series must be taken into consideration.⁶ But unless closely related and interdependent, such papers are not admissible for the purpose of getting at the meaning of a document under investigation.⁷ It is not necessary, however, that the documents should bear the same date, if they relate to the same subject.⁸ If they so relate they may be read together, as a bond accompanying a mortgage, to explain a mortgage.⁹

§ 666. It is a rule of construction that when there is a general conveyance of a right, with an exception, the right

¹ Pearsall v. Summersett, 4 Taunt. 467; Whitehust v. Boyd, 8 Ala. 375; 593; Hassell v. Long, 2 M. & S. 363; Sewall v. Henry, 9 Ala. 24; Dean v. Bell v. Bruen, 1 How. 169. Lawham, 7 Oregon, 422.

² Rooke v. Kensington, 2 K. & J. 753; Jenner v. Jenner, L. R. 1 Eq. 361; as to releases, see *infra*, § 1037. ⁶ Wh. on Ev. §§ 1103, 1127; Stucky v. Bailey, 1 H. & N. 405; Stevens v. Baird, 9 Cow. 274; Morss v. Salisbury, 48 N. Y. 646; Cordray v. Mordecai, 2

³ Browning v. Wright, 2 B. & P. 13. ⁷ Rich. 518; Casey v. Holmes, 10 Ala. 776; Hill v. Parker, 10 Ill. Ap. 323; N. J. Eq. 174. ⁸ Woodruff v. Savings Institution, 34 Munson v. Osborn, 10 Ill. Ap. 508.

⁵ Wh. on Ev. §§ 1015, 1103-4; Leake, 2d ed. 229; Coldham v. Showler, 3 C. B. 312; Sawyer v. Hammett, 15 Me. 40; ⁹ Wh. on Ev. §§ 1103, 1127; Mann v. Salmon Falls Man. Co. v. Portsmouth, 46 N. H. 249; Strong v. Barnes, 11 Vt. 221; Makepeace v. Howard Coll., 10 Pick. 298; Cummings v. Antes, 19 Penn. St. 287; Blim v. Torode, 4 Phil. 118; Galena R. R. v. Barrett, 95 Ill. 467; Whitehust v. Boyd, 8 Ala. 375; Sewall v. Henry, 9 Ala. 24; Dean v. Lawham, 7 Oregon, 422.

⁶ Wh. on Ev. §§ 1103, 1127; Mann v. Whitbeck, 17 Barb. 388. ⁷ Rich. 518; Casey v. Holmes, 10 Ala. 776; Hill v. Parker, 10 Ill. Ap. 323; Munson v. Osborn, 10 Ill. Ap. 508.

⁸ Adams v. Hill, 16 Me. 215; Van Hagen v. Van Rensselaer, 18 Johns. 420; Thompson v. McClenachan, 17 S. & R. 110. ⁹ Kennedy v. Ross, 25 Penn. St. 256.

is to be strictly construed. A grant might be made nugatory by a liberal construction of an exception; and when the object of the conveyance is to pass something substantial only that is to be taken out which the words require.¹ A proviso, also, which annuls a grant will be considered as a nullity.² An explanatory condition or proviso, however, when not repugnant to the context, will not be rejected, but will be regarded as a limitation.³ But, as a general rule, words of exception are to be construed, in cases of doubt, most strongly against the party in whose favor they are introduced.⁴ Conditions in restraint of alienation, also, will be strictly construed, and not permitted to operate unless plainly expressed.⁵

Exceptions and provisions to be strictly construed.

§ 667. "*Verba generalia restringuntur ad habilitatem rei vel personæ.*"—"All words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person."⁶ Thus in a policy of insurance against "restraint of kings, princes, and people of what nation, condition, or quality soever," "people" has been construed to mean ruling powers, and not individual marauders,⁷ and a covenant in a lease for quiet enjoyment has been held to apply to evictions on lawful title, and not to confiscations by government or disturbance by private assailants.⁸ A narrow recital, also, will not control a larger condition which it is the manifest intention of the document to carry into effect.⁹ General words, also, grammatically applicable to only one covenant may be

Specific meaning is to be brought out.

¹ Leake, 2d ed. 232; *Taylor v. Liverpool Co.*, L. R. 9 Q. B. 546; *Bathurst v. Stanley*, L. R. 4 C. D. 251.

² *Story*, Cont. § 809; *Bac. Abr.* Grants, L. 1; *Jackson v. Ireland*, 3 Wend. 99.

³ *Ibid.*; *Stewkley v. Butler*, F. Moore, 880.

⁴ *Ch. on Cont.* 11th Am. ed. 137; *Bullen v. Denning*, 5 B. & C. 842; *Donnell v. Ins. Co.*, 2 Sumn. 366; *Jackson v. Lawrence*, 11 Johns. 191; *House v. Palmer*, 9 Ga. 497.

⁵ *Brothers v. McCurdy*, 36 Penn. St. 407.

⁶ *Bacon's Maxims*, Reg. 10; Leake, 2d ed. 227; *Hitchen v. Groom*, 5 C. B. 515; *Gunnsted v. Price*, L. R. 10 Ex. 69; *German v. Chapman*, L. R. 7 C. D. 271; *Hoffman v. Ins. Co.*, 32 N. Y. 405; *Chapin v. Clemiston*, 1 Barb. 311; *Hall v. Bank*, 53 Md. 120.

⁷ *Nesbitt v. Lushington*, 4 T. R. 783.

⁸ *Chanudflower v. Priestley*, Yelv. 30.

⁹ *Sansom v. Bell*, 2 Camp. 39.

construed to extend to other covenants when the sense of the entire document is thus more fully brought out.¹ On the other hand, when a recital is descriptive and explanatory, it may control words of disposal, which, on the face of the document, are meant to be subordinated to the recital.²

§ 668. When an object is adequately described, the contract will not be vitiated by the introduction of minor descriptive details which may be erroneous. *Falsa demonstratio non nocet*.³ The mere accumulation of details, some of them erroneous, will not avoid the instrument when the object of which it treats is adequately identified.⁴—The rule rejecting surplusage has been extended so far as to exclude expressions in a contract which are repugnant to its general sense.⁵

§ 669. Material qualifications, however, cannot be left out of consideration. Whatever is material must be considered as part of the context.⁶

¹ Young v. Raincock, 7 C. B. 340; Browning v. Wright, 2 B. & P. 3.

² Bell v. Bruen, 1 How. 169.

³ Wh. on Ev. § 945.

⁴ Leake, 2d ed. 229; Wh. on Ev. § 948; Smith v. Galloway, 5 B. & Ad. 43; Slingsby v. Grainger, 7 H. of L. Ca. 282; Llewellyn v. Jersey, 11 M. & W. 183; Doe v. Hubbard, 15 Q. B. 245; McMurtry v. Spicer, L. R. 5 Eq. 527; Atkinson v. Cummins, 9 How. 470; Brown v. Huger, 21 How. 305; Esty v. Baker, 19 N. H. 273; Putnam v. Bond, 100 Mass. 58; Drew v. Swift, 46 N. Y. 207; Lodge v. Barnett, 46 Penn. St. 484; Miller v. Cherry, 3 Jones (N. C.) Eq. 29.

⁵ Cleveland v. Smith, 2 Story, 287.

Ulpian gives an amusing illustration of the principle in the text. He supposes a case in which the sponsor, in replying to the question of the stipulator, instead of saying simply "spondeo," says "arma virumque cano," "spondeo." The jurist decides naturally of this interpolation, "nihilominus valet," because it is to be con-

sidered as "pro-supervacuis," or surplusage. The "arma virumque cano" is obviously introduced by Ulpian as an extreme irrelevancy, the principle being that the intrusion of irrelevant matter does not impair validity. Koch, ii. 225.

In this sense applies the maxim *falsa demonstratio non nocet*; by force of which an erroneous filling in of details does not vitiate a document when it contains adequate general terms setting forth satisfactorily all that is required for exactness. 1 Ch. on Cont. 11th Am. ed. 122; Wh. on Ev. § 945; Morrell v. Fisher, 3 Exch. 591; Llewellyn v. Jersey, 11 M. & W. 183; Webber v. Stanley, 10 C. B. N. S. 699; Ridgway v. Bowman, 7 Cush. 268; Drew v. Swift, 46 N. Y. 209; White v. Williams, 48 N. Y. 344; Kreiter v. Bomberger, 82 Penn. St. 59.

⁶ Hotham v. E. I. Co., 1 T. R. 638; Barber v. Wood, L. R. 4 Ch. D. 885; Worthington v. Hylyer, 4 Mass. 196; Kreiter v. Bomberger, 82 Penn. St. 59.

§ 670. When a party introduces an expression having two meanings, one larger, the other more limited, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrower construction.¹ Thus, where an insurance company tenders a policy to a party seeking to be insured, and uses in the policy ambiguous words, these words will be held to have the meaning most favorable to the insured, as the presumption is that on this construction he took the policy, and as the company could have avoided the difficulty by being more specific.² "In construing such a document," said Blackburn, J., "you must bear in mind that they are the words of the party who used them, and if he uses ambiguous words with the intention that the other side may take them to mean one thing, and when the question is to be settled by a court, that court may say they meant something else, the rule applies; and they ought to be construed in that sense in which, looking fairly at them, a prudent man would have understood the words to mean."³—And, as a general rule, it has also been held that when a stipulation or an exception to a policy of insurance, emanating from the insurers, is capable of two meanings, that meaning is to be adopted which is most favorable to the insured.⁴—A deed-poll, also, ambiguous in its terms, and having two equally probable meanings, will be so construed as to have the meaning most against the

Ambiguities to be construed against the party introducing them.

¹ *Weak v. Escott*, 9 Price, 595; *Hargreave v. Smee*, 6 Bing. 244; *Browning v. Wright*, 2 B. & P. 22; *Taylor v. St. Helens*, L. R. 6 C. D. 270; *Cutler v. Tufts*, 3 Pick. 272; *Deblois v. Earle*, 7 R. I. 26; *White v. Smith*, 33 Penn. St. 186. See *supra*, § 659. As to releases, see *infra*, § 1037.

² *Fowkes v. Ins. Co.*, 3 B. & S. 917.

³ See to same effect *supra*, § 657.

⁴ *Marvin v. Stone*, 12 Cow. 806; *Rann v. Ins. Co.*, 59 N. Y. 389; *Allen v. Ins. Co.*, 85 N. Y. 473; *West. Ins. Co. v. Cropper*, 32 Penn. St. 351; *Franklin Ins. Co. v. Updegraff*, 43 Penn. St. 350;

Franklin Ins. Co. v. Brock, 57 Penn. St. 74; and see generally to same effect *Wood on Ins.* §§ 141–6; *May on Ins.* §§ 172, 179. That terms emanating from insurer are to be construed in cases of doubt against insurer, see *May on Ins.* §§ 172 *et seq.*; *Fowkes v. Ins. Co.*, 8 B. & S. 917; *Ins. Co. v. Slaughter*, 12 Wall. 404; *Palmer v. Ins. Co.*, 1 Story, 360; *Bartlett v. Ins. Co.*, 46 Me. 500; *Wilson v. Ins. Co.*, 4 R. I. 156; *Reynolds v. Ins. Co.*, 47 N. Y. 597; *North Am. Ins. Co. v. Zaenger*, 63 Ill. 464; *Bowman v. Ins. Co.*, 27 Mo. 152.

grantor.¹ The same principle is extended to all stipulations. Thus, when authority was given to A. to draw on B. "at ten or twelve days," nothing in the letter showing whether "after date" or "after sight" was meant, it was held that A. was entitled to elect the construction most promotive of his interests.² When, however, a contract is concurrently settled by both parties, the rule before us does not apply. In such case neither party can be regarded as distinctively propounding any specific terms.³ So far, however, as concerns stipulations emanating from either party, ambiguous terms are to be construed, in cases of doubt, most strongly against the particular party first making use of the term.⁴ It must also be kept in mind that the rule before us only applies in cases where there are two probable constructions to be given to the contested clause. No construction, in itself improbable, can be adopted by force of

¹ *Beeson v. Patterson*, 36 Penn. St. 24.

"Where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator, and in favor of the other party." Per cur. in *McConnel v. Murphy*, L. R. 5 P. C. 219; see *Lincoln v. Wilder*, 29 Me. 169; *Cocheco Co. v. Whittier*, 10 N. H. 305; *Jackson v. Blodget*, 16 Johns. 172.

"Where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant." Maule, J., *Cockburn v. Alexander*, 6 C. B. 814, quoted Leake, 2d ed. 232; *S. P. Garrison v. U. S.*, 7 Wall. 688; see *Melvin v. Proprietors*, 5 Met. (Mass.) 15.

"It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor." Story, J., *Charles River Bridge v. Warren Bridge*, 11 Peters,

589; *S. P. Winslow v. Patten*, 36 Me. 369; *Thrall v. Newell*, 19 Vt. 202; *Mills v. Catlin*, 22 Vt. 98; *Melvin v. Proprietors*, 5 Met. (Mass.) 27; and see *Mayer v. Isaac*, 6 M. & W. 612; *Pike v. Munroe*, 36 Me. 309; *supra*, § 654. A guaranty, for instance, is to be construed most strongly against the guarantor, *supra*, § 656; *Stephens v. Pell*, 2 C. & M. 710; *Hargrave v. Smee*, 6 Bing. 244.

² *Barney v. Newcomb*, 9 Cush. 46. In the Roman law the same position is repeatedly affirmed. L. 38, § 18, I. 99 pr. I. § 106—D. de V. O. 45, I.; L. 26, D. de reb. dub. 34.5—Seuff. Arch. III. 301.

³ *Supra*, §§ 641 *et seq.*; *Cardigan v. Armitage*, 2 B. & C. 197; *Brown v. McGrau*, 14 Pet. 480; *Beckwith v. Howard*, 6 R. I. 1.

⁴ *Ibid.*; *Browning v. Wright*, 2 B. & P. 22; *Donnell v. Ins. Co.*, 2 Sumn. 366; *Jackson v. Hudson*, 3 John. 387. This is virtually the distinction of Dr. Paley, *supra*, § 657.

this or any other technical rule of construction.¹ And the rule is disregarded when it would work a penalty or forfeiture,² or cause a wrong to a third party.³—Hence the rule is to be strictly limited to cases where the term in question is on its face ambiguous, and is introduced into the contract by the party seeking afterwards to impose on it a narrower sense. No such construction is applicable to words which are necessary in the statement of the particular contract, and which are as imputable to one party as to the other.—Exceptions to general conveyances of a right, as we have seen, are to be construed, in questions of doubt, against the party in whose favor they are made.⁴

¹ *Lindus v. Melrose*, 3 H. & N. 177; *Borradaile v. Hunter*, 5 M. & G. 639; *Barton v. Fitzgerald*, 15 East, 546; *Adams v. Warner*, 23 Vt. 411.

² 1 Ch. on Cont. 11th Am. ed. 138.

³ *Ibid.*, citing 1 Kent Com. 557.

⁴ *Supra*, § 666; *Buller v. Denning*, 5 B. & C. 842; *Jackson v. Laurence*, 11 Johns. 191; *Cochecho Co. v. Whittier*, 10 N. H. 305. See *Munn v. Baker*, 2 Stark. 226; *Ford v. Beach*, 11 Q. B. 852, where it was held that ambiguities were to be construed so as best to bring out the general sense.

The following distinctions from Mr. Powell are well worthy of consideration:⁵ “If there be in the terms of a contract any obscurity or dubiousness, which cannot be cleared up by the intention of the contracting parties, or any other circumstance, and all other rules of exposition of words fail, then the construction ought to be *against him who ought to have explained himself or made the other have delivered himself fully*. And, therefore, he who is obliged ought to speak clearly, or otherwise, in general, the other party has a right to explain the clause for his own advantage. . . . In this rule of construction the law of England agrees with the Roman

law, wherein it was a maxim that all obscurities and ambiguities in a bargain of sale, or letting, must be interpreted against the seller or landlord.”

“But,” Mr. Powell adds, “in this respect the determination of the common law of England and the Roman law, are, in some instances, in opposition to the nature of things; for if the thing contracted about be burdensome to the party whose words are to be expounded, the interpretation to be agreeable to the intent, as the latter must be presumed from the nature of things, ought to be favorable to him; for every one seeks his own advantage, and consequently engages himself to as little inconvenience as possible; whereas, according to the construction alluded to, he is presumed to have bound himself as strictly as the words in their largest sense will effect. Therefore, perhaps, we should come nearer the truth, if we were to hold that the contracting party for whose benefit the agreement is burdensome to the other, is he who should either explain himself, or make the other explain himself, with all the clearness necessary to prevent ambiguity or obscurity.” Hence, “words or sentences used in the condi-

⁵ *Powell Cont.* (N. Y. 1825) 237 *et seq.*

§ 671. We have already seen that in construing a document the construction most in accordance with good faith will be

tion of a bond, which, considered simply in their own nature, are equivocal or ambiguous, shall, *generally*, in respect of the object of the condition, be taken in ease and favor of the obligor; the reason of which seems to be, that they are inserted for his advantage, and to discharge him from a penalty.¹ "Another exception to the rule of accepting ambiguous words most strongly against the speaker, is where such construction will work a wrong to others. . . . Subject to the above observation, words are to be understood in the most comprehensive sense in which they are generally accepted."² The Roman rule, to the above effect, is based on the assumption that the party against whom, in case of ambiguity, the ambiguity is to be construed, could, if he had desired, have expressed himself more clearly;³ "quia potuit—apertius dicere." To the same effect is Boehmer's conclusion: "interpretatio facienda est contra eum qui clarius loqui debuisset."⁴ The question upon this arises, who is the party whose duty it was to have introduced greater definiteness into the contract? Now it may happen that the party from whom certain expressions nominally emanate may not be the party from whom they actually emanate; as when certain clauses are

taken from a draft by the other party, or where a scrivener is employed who is the agent of the other party, or who is the common agent of both parties. It may also happen that the party from whom the paper emanates may be a mere stake-holder standing impartially between the real litigants; or that by the misconduct of the other side the blame of his failure to express himself accurately should fall on such other side and not on himself.⁵ Should any one of these exceptions exist, the duty being shifted, the inference from it falls.

In the Roman law, on the question as to who is responsible in this sense for the expressions used in a contract, we have the following conclusions:—

1. In stipulations the duty is on the stipulator, as he is the one on whom the duty of propounding the question falls. On the same reasoning, in cases of a proposal and simple acceptance, then the duty of unambiguity falls on the person making the proposal.⁶

2. In contracts of sale the duty falls on the vendor, in contracts of hiring, on the hirer, because such parties, having possession of the thing sold or hired, are more familiar with its character, and, from the nature of the case, know what interests they propose to part with.

3. Subsidiary clauses are to be con-

¹ Ibid.

² See Savigny, *Sys. Röm. Rechts*, I. §§ 32 ff.; Koch. § 91.

³ L. 21 D. de cont. emt. xvii. 1. To the same effect are L. 39 D. de pactis. ii. 14; L. 99 D. de verb. ob. xlv. 1.

⁴ Boehmer's treatise is under the title "De interpretatione facienda con-

tra eum qui clarius loqui debuisset," Halle, 1767.

⁵ See these points discussed in Boehmer, *op. cit.* § 19; and in Steeb, *diss. sistens quaestionem qui sit is, qui in conventionem ambigua clarius loqui debuisset*, Tub. 1792.

⁶ See *supra*, §§ 2, 8.

taken. It follows from this that when a party introduces terms fraudulently with intention afterwards to take advantage of their ambiguity, the sense less favorable to himself will be preferred by the court; the ostensible meaning, as understood by the other side, excluding the secret meaning fraudulently reserved by himself.¹

And so as to fraudulent terms.

§ 672. "Semper in dubiis benigniora praeferenda sunt," is a Roman maxim which is authoritative in our own jurisprudence.² To the same effect is the rule "Semper in obscuris quod minimum est sequimur."³ In other words, the construction, in all cases of doubt, should be such as to dispense remedial justice.⁴

In doubt more benignant construction to be preferred.

§ 673. Although when in a will there are two incompatible provisions the last is to prevail, the common rule as to deeds is that the first of two incompatible provisions is to prevail as against the second in all cases in which the incompatibility is not such as to make the document insensible.⁵ It is otherwise

Where there are incompatible clauses, the first prevails.

strued against the party by whom they are introduced.⁶

The conclusions above stated are based on the rule which has been already discussed, that where a party making a statement is bound to disclose all the facts, he becomes liable for the consequences of his non-disclosure.⁷ A party who could state specific facts which are important ingredients in a proposal he makes, but declines so to do, is estopped from setting up these facts against the party who accepts his proposal on the faith of the terms he presents; and for the same reason a party is estopped in

setting up facts which would resolve in his favor ambiguities which the other party had *bona fide* taken in a sense more favorable to himself.⁸

¹ *Supra*, §§ 654, 657; see *Collis v. Emmett*, 1 H. Bl. 313.

² L. 168 pr. I. 192, § 1, eod., I. 32 § 4 D. de don. I. V. e. u. 24 I.

³ L. 9. 34, D. de R. I. 50, 17.

⁴ *Noonan v. Bradley*, 9 Wall. 395; see *Whitehouse v. Gas Co.*, 5 C. B. 798; *Mallan v. May*, 13 M. & W. 511.

⁵ *Furnwall v. Combes*, 3 M. & G. 736; *Cother v. Merrick*, Hardw. 94; *Cope v. Cope*, 15 Sim. 118; *Gully v. Gully*, 1 Hawks, 20.

⁶ See Zacharia, Versuch einer allgemeinen Hermeneut. Meissen, 1805, § 88.

⁷ *Supra*, § 249.

⁸ See Bigelow on Est. 3d ed. pp. 486 et seq. In *Adams v. Brown*, 16 Oh. St. 175, a party using an ambiguous name was held estopped from setting up the true meaning of the name as against

the other party who *bona fide* accepted the name in another probable meaning. In *Knights v. Wiffen*, L. R. 5 Q. B. 660, an ambiguous letter was held to estop, as against the party *bona fide* taking it on a probable construction, the party from whom it emanated; see criticism in Big. Est. 3d ed. 558.

when the second limitation only qualifies the first.¹ But when there are several contracts of different dates, the latest overrides its predecessors.²

§ 674. When there is a general conveyance of a right, this implies a conveyance of all the powers incidental to the exercise of such right.³ It is otherwise when after general terms of conveyance specifications are made indicating that the right is to be exercised in a particular way by the promisee or grantee. In such case the exercise of the right is to be ordinarily confined to the modes specified.⁴ The question in the text is one as to which there will be necessarily great conflict of opinion, since, in its bearing on political issues in this country it is a question as to which men will divide according as their tendencies are imperialistic or particularistic—as they are disposed to see great powers centralized in the national government, or are convinced that it is safer and wiser that the reserved powers should be deposited in the states—as they are, in other words, broad constructionists or strict constructionists.—It should be remembered, however, that though logically the application of the maxim to political documents should be the same as its application to business documents, there are considerations applicable in the political field which are not applicable in the business field.—So far as concerns statutory powers, it may be generally held that where there is a statute “creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize may be taken as prohibited.”⁵ In respect to business contracts, the rule is that “where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by implication; the presumption is that, having expressed *some*, they have expressed *all* the conditions by which they intend to be bound under that in-

*Expressio
unius est
exclusio
alterius.*

¹ Chase v. Bradley, 26 Me. 538; 2 Story Const. 429–440, 519–538; Pollock v. Ireland, 3 Wend. 99; But- lock, 3d ed. 132.
² Loper v. U. S., 13 Ct. of Cl. 269.
³ See 1 Kent, Com. Part ii. Lect. xii;

⁴ Ibid.

⁵ Lord Blackburn in At. Gen. v. R. R., L. R. 5 Ap. Ca. 481; R. v. Read, L. R. 5 Q. B. D. 488.

strument.”¹ This, however, is to be subject to the general principle that the whole intention of the instrument is to be taken into consideration; and if the specification is introduced by way of illustration, and not of limitation, it is not to restrict the prior general terms.²

¹ *Aspdin v. Austen*, 5 Q. B. 683; *Saunders v. Evans*, 8 H. L. Ca. 729, *Emmens v. Elderton*, 4 H. L. Cas. 624. and cases cited *Brown's Leg. Max.* 654

² See *Price v. R. R.*, 16 M. & W. 244; *et seq.*
Attwood v. Small, 6 Cl. & F. 232;

CHAPTER XX.

DEEDS AND SEALED CONTRACTS.

Delivery and acceptance essential to validity of deed, § 677.	Sealed obligations have longer limitations than unsealed, § 685.
Deed takes effect from delivery, § 678.	No priority to specialty debts, § 686.
Escrow is a deed delivered on condition, § 679.	Alteration after execution avoids : filling in blanks, § 687.
Sealing is a solemn mode of assent, § 680.	Party executing deeds is bound, though other party has not executed, § 688.
Due sealing will be presumed, § 681.	Common money bond binds only for actual indebtedness, § 689.
Sealing imports consideration, § 682.	Specialty may be modified or rescinded by parol, § 690.
Consideration cannot be disputed by those claiming under deed, § 683.	Rules of construction the same as for other documents, § 691.
Simple contracts distinguishable from sealed contracts as to quality, as to consideration, and as to merger, § 684.	

§ 677. To MAKE a deed operative, it is necessary that it should either be delivered to the grantee or his agent, or retained in express trust for him by the grantor.¹ It is not necessary that it should be put for this purpose actually in the hands of the grantee.² If the grantor retain it in his possession for the grantee's use, to be handed to the grantee when called for, the intention being expressed to be that the deed should be operative at once, this is equivalent to a delivery.³ Delivery to a stranger for the grantee's use is equivalent to delivery to the grantee, though to have this effect it should have been

¹ *Murray v. Stair*, 2 B. & C. 82; 3 Ill. 381; *Fraser v. Davie*, 11 S. C. 56; D. & R. 278; *Watkins v. Nash*, L. R. 20 Eq. 262; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Younge v. Guilbeau*, 3 Wall. 636; *Merrills v. Swift*, 18 Conn. 261; *Berkshire Ins. Co. v. Sturgiss*, 13 Gray, 178; *Whitaker v. Miller*, 83

Ill. 381; *Fraser v. Davie*, 11 S. C. 56; *Davis v. Williams*, 57 Miss. 843.

² *Cocks v. Simmons*, 57 Miss. 183.

³ *Garnons v. Knight*, 5 B. & C. 671; *Xenos v. Wickham*, L. R. 2 H. L. 296; see *Hawkes v. Pike*, 105 Mass. 560; *Latham v. Udell*, 38 Mich. 238.

manifestly so intended.¹ Possession by the party to be benefited by a deed is a ground from which to infer delivery.² Delivery of a deed may be inferred from the fact that it is left unconditionally with the proper officer after acknowledgment;³ and from the fact that it has been duly recorded;⁴ though this may be rebutted by proof that grantor never was out of possession and the grantee never in possession.⁵ Delivery of a deed may be also inferred from transfer of possession of property and possession of the concomitant papers,⁶ and it may be proved and disproved by parol.⁷ Delivery, therefore, is a question of fact to be determined on all the circumstances of the case.⁸ And the mere fact that a grantor retains possession of a deed is not sufficient in equity to make it inoperative, when it is proved *aliunde* that he regarded it as delivered.⁹ But in such cases it should be satisfactorily shown that a delivery was effected, notwithstanding the detention by the grantor.¹⁰—Acceptance as well as delivery is essential

¹ Leake, 2d ed. 136; *Doe v. Knight*, 5 B. & C. 671; *Thatcher v. Church*, 37 Mich. 764.

² Wh. on Ev. §§ 1313-4; *Hall v. Bainbridge*, 12 Q. B. 699; *Vernol v. Vernol*, 63 N. Y. 45; *Black v. Shreve*, 13 N. J. Eq. 455; *Den v. Farlee*, 21 N. J. L. 280; *Carson v. Phelps*, 40 Md. 73; *Tunison v. Chamblin*, 88 Ill. 378; *Berry v. Anderson*, 22 Ind. 36; *Green v. Yarnell*, 6 Mo. 326; *Firemen's Ins. Co. v. McMillen*, 29 Ala. 147.

³ *Shaw v. Heyward*, 7 Cush. 170; *Blight v. Schenck*, 10 Barr, 285; *Gage v. Gage*, 36 Mich. 229.

⁴ *Berkshire Ins. Co. v. Sturgiss*, 13 Gray, 178; *Gilbert v. Ins. Co.*, 23 Wend. 43; *Knolls v. Barnhart*, 71 N. Y. 474; *Boardman v. Dean*, 34 Penn. St. 252; *Mitchell v. Ryan*, 3 Oh. St. 377; *Union Ins. Co. v. Campbell*, 95 Ill. 267; *Cecil v. Beaver*, 28 Iowa, 241; *Holliday v. White*, 33 Tex. 460; though see *Hawkes v. Pike*, 105 Mass. 560.

⁵ *Knolls v. Barnhart*, 71 N. Y. 474.

⁶ Wh. on Ev. §§ 1313-4; *Dukes v.*

Spangler, 35 Oh. St. 119; *Tharp v. Jarrell*, 66 Ind. 52; *Goodwin v. Ward*, 6 Bax. 107.

⁷ *Murray v. Stair*, 2 B. & C. 82; *S. C.*, 3 D. & R. 278; *Stanton v. Miller*, 65 Barb. 58; *Beall v. Poole*, 27 Md. 645; *Dukes v. Spangler*, 35 Oh. St. 119; *Gunnell v. Cockerill*, 84 Ill. 319; *Newton v. Beales*, 41 Iowa, 334. As to conditional delivery, see Wh. on Ev. § 930; *infra*, § 679.

⁸ *Xenos v. Wickham*, L. R. 2 H. L. 296; *Howe v. Dewing*, 2 Gray, 476; *Cannon v. Cannon*, 26 N. J. Eq. 319; *Den v. Farlee*, 21 N. J. L. 285; *Duer v. James*, 42 Md. 492; *Wellborn v. Weaver*, 17 Ga. 267.

⁹ *Shelton's case*, Cro. Eliz. 7; *Regan v. Howe*, 121 Mass. 424; *Souverby v. Arden*, 1 Johns. Ch. 256; *Cannon v. Cannon*, 26 N. J. Eq. 319; *Jones v. Oberchain*, 10 Grat. 259; *Dawson v. Dawson*, 1 Dev. Eq. 93, 396; *Wall v. Wall*, 30 Miss. 91; *Farrar v. Bridges*, 5 Hump. 411.

¹⁰ *Gould v. Day*, 94 U. S. 412; *Woodman v. Coolbroth*, 7 Me. 181; *Brown v.*

to give validity to a deed, and this acceptance must be before the rights of third parties have intervened.¹

§ 678. The dates set out in a deed, though presumed *prima facie* to be true, may be contradicted and varied by parol.² The deed takes effect from the time of its delivery, and not from its date.³ "The real date of the deed is the time of the delivery."⁴ Hence, where a tax deed did not mention the year of its execution, but the acknowledgment was fully dated and the deed was shown to have been recorded the same day, it was held, that it should have been received in evidence, and that the statute of limitations

Brown, 66 Me. 316; Cook v. Brown, 34 N. H. 460; Eckman v. Eckman, 55 Penn. St. 269; Hughes v. Easten, 4 J. J. Marsh. 573; see Howard v. Patrick, 38 Mich. 795; Benneson v. Aiken, 102 Ill.

¹ Dwinal v. Holmes, 33 Me. 172; White v. Bradley, 66 Me. 254; Johnson v. Farley, 45 N. H. 505; Corbett v. Norcross, 35 N. H. 99; Hedge v. Drew, 12 Pick. 141; Samson v. Thornton, 3 Metc. 275; Fonda v. Sage, 46 Barb. 109; Mitchell v. Ryan, 3 Oh. St. 377; Union Ins. Co. v. Campbell, 95 Ill. 267. See, for other cases, article by Mr. H. W. Rogers in 13 Cent. L. J. 223. In a Massachusetts case in 1880, the issue was whether a deed to a town of a lot of land, on the condition that a library building should be erected on it, had been delivered to and accepted by the town. It was in evidence that the deed, after signature, was left with the grantor, and was acknowledged by him about a month later, and was recorded twelve days after the acknowledgment. It also appeared that the library building, in compliance with a vote of the town, had been erected on the lot. It was held that there was evidence enough to sustain a finding that the deed had

been delivered and accepted; and it was also held that the fact that the deed was found among the grantor's papers after his death did not overcome the inference of delivery drawn from the other facts in the case. Snow v. Orleans, 126 Mass. 453.

² Wh. Ev. § 977; Fowle v. Coe, 63 Me. 245; Cook v. Knowles, 38 Mich. 316.

³ Ibid.; Hall v. Cazenove, 4 East, 477; Steele v. Mart, 4 B. & C. 272; U. S. v. Le Baron, 19 How. 73; Calhoun v. Emigrant Co., 93 U. S. 124; Barnard v. Kuhn, 36 Penn. St. 383; Hanley v. Wilson, 77 N. C. 216; Solomon v. Evans, 3 McC. 274. In Byars v. Spencer, 101 Ill. 429, where a father made and acknowledged a deed to his two minor children, but retained it in his possession until his death, and declined to have it recorded, on the express ground that he would thereby place the title beyond his power or control, and expressed an intention, after he had made and acknowledged the deed, to sell the land if he could get a certain price, and in pursuance of that intention, did offer to sell the land, it was held that the deed was inoperative for want of a delivery.

⁴ Kent, C. J., Jackson v. Schoonmaker, 2 Johns. 234.

began to run thereon from the date of its recording.¹—When two deeds are acknowledged and received for record on the same day, they may be inferred to be delivered simultaneously, irrespective of the dates they bear.²—The legal effect of delivery, when consummated, is not cancelled by a subsequent return of the deed to the grantor, and its destruction by him.³

§ 679. A deed delivered with the understanding that it is not to be effective until a condition is performed is called an *escrow*.⁴ Such delivery must be to a third party as custodian of the deed; or the deed may be retained as an escrow by the grantor himself, with the understanding that on the condition being performed it shall be delivered to the grantee.⁵ That such is the intention may be proved by parol.⁶ A deed delivered as an escrow takes effect, so far as the capacity of the grantor is concerned, from the time of its original delivery, and not from the time of the happening of the condition.⁷ Hence, where the grantee, a woman, after delivering a bond on condition, and before the happening of the condition, married, the bond was held valid.⁸ And where either party dies after the depositing of an escrow, and before the happening of the condition, the deed takes effect from the time of the original delivery.⁹ The title, however, is not perfected in the grantee until the

An escrow is a deed delivered on condition.

¹ McMichael v. Carlyle, 53 Wis. 504.

² Summers v. Darne, 32 Grat. 791.

³ Lowber v. Connit, 36 Wis. 176; Rogers v. Rogers, 52 Wis.

⁴ Wh. on Ev. §§ 927–30; 1 Ch. on Con. 11th Am. ed. 4; Gudgen v. Bessett, 6 E. & B. 986; Bowker v. Burdakin, 11 M. & W. 128; Wheelwright v. Wheelwright, 2 Mass. 447; Mills v. Gore, 20 Pick. 28; Shaw v. Hayward, 7 Cush. 170.

⁵ Murray v. Stair, 2 B. & C. 82; S. C., 3 S. & R. 278; Ford v. James, 2 Abb. N. Y. Ap. 159; Beall v. Poole, 27 Md. 645; Demesmey v. Gravelin, 56 Ill. 93.

⁶ Wh. on Ev. § 930; Murray v. Stair, 2 B. & C. 82; Gudgen v. Bassett, 6 E. & B. 986; see, as qualifying this

view, Braman v. Bingham, 26 N. Y. 483; Miller v. Fletcher, 27 Grat. 403; Gibson v. Partee, 2 Dev. & Bat. L. 530.

⁷ Wheelwright v. Wheelwright, 2 Mass. 447; Foster v. Mansfield, 3 Met. 412; Black v. Hoyt, 33 Oh. St. 203; see Crooks v. Crooks, 34 Oh. St. 610.

⁸ Leake, 2d ed. 138; Graham v. Graham, 1 Ves. Jur. 275.

⁹ Russell v. Rowland, 6 Wend. 666; Hunter v. Hunter, 17 Barb. 25; Kirkman v. Bank, 2 Cold. 397. That a deed may be deposited to take effect on grantor's death, see Foster v. Mansfield, 3 Met. 412; Stephens v. Rinehart, 72 Penn. St. 434; Latham v. Udell, 38 Mich. 238.

happening of the condition.¹ Hence, when a deed which is handed over as an escrow is delivered irregularly to the grantee before the happening of the condition, no title passes.²—A deed may be delivered as an escrow to an attorney acting for all the parties;³ but generally if there be a delivery as an escrow, it must be a delivery to a third party, or the representative of a third party.⁴—A mere expectation that something will be done with a deed by the grantee, does not convert it into an escrow.⁵—The grantor, when the deed has been placed in the hands of a third party as an escrow, cannot, after the happening of the act on which delivery is conditioned, prevent delivery taking effect, by getting possession of the deed.⁶

§ 680. Sealing is a solemn mode of assent adopted at a time when there were many who had property to convey who could not write their names.⁷ Sealing has been held to be sufficiently performed if the seal be impressed on the document with intent to stamp it, though no impression be left.⁸ A scroll marked out with a pen, or stamped with a block, has been held in some jurisdic-

¹ *Harkreader v. Clayton*, 56 Miss. 383.

² *Smith v. Bank*, 32 Vt. 341; *Wheelwright v. Wheelwright*, 2 Mass. 452; *Black v. Shreve*, 13 N. J. Eq. 455; *Blight v. Schenck*, 10 Penn. St. 213; *Harkreader v. Clayton*, 56 Miss. 383.

³ *Millership v. Brookes*, 5 H. & N. 797.

⁴ 1 Ch. on Con. 11th Am. ed. 5; Co. Lit. 36 a; *Howe v. Dewing*, 2 Gray, 476; *Gilbert v. Ins. Co.*, 23 Wend. 43; *Simonton's Est.*, 4 Watts, 180; *Firemen's Ins. Co. v. McMillen*, 29 Ala. 147; *Hagood v. Harley*, 8 Rich. 325; *Den v. Partee*, 2 Dev. & B. 530. The rule of law that a deed cannot be delivered to a party to whom it is made, as an escrow, to be the deed of the obligor only on the condition, and that in such case the delivery is abso-

lute and the condition nugatory, is held in Virginia to be applicable only to the case of deeds which are upon their face complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; not to deeds which, upon their face, import that something more is to be done besides delivery to make them competent and perfect contracts according to the intention of the parties. *Wendlinger v. Smith*, 75 Va. 309.

⁵ *New Jersey State Ordinary v. Thatcher*, 41 N. J. L. 403.

⁶ *Regan v. Howe*, 121 Mass. 424.

⁷ *Wald's Pollock*, 124; Wh. on Ev. § 692.

⁸ *Sandilands in re*, L. R. 6 C. P. 411.

tions to be equivalent to a seal;¹ and for corporations, a distinct impression stamped upon paper has been held adequate.² Printed fac-similes of corporation seals, however, attached in gross by the ordinary operation of a printing press, have been held not to be technically seals.³—Two or more parties to a document may join in using a common seal for their signatures, and if this be their intention, the single seal will be sufficient.⁴ For corporations, sealing is the only mode practicable for the expression of solemn assent, though the corporation may be bound by the action without seal of its directors or other officers duly appointed.⁵ But there can be no specialty without a seal.⁶

§ 681. When a document recites a seal, and when in other respects it is duly attested and executed, accompanied by transfer of possession, the courts may presume, on slight indications, that a seal which had been attached had fallen off, or had been otherwise effaced.⁷ The whole question is one of fact, in which the affixing of the seal is to be considered in the light of the extrinsic circumstances.⁸

Due sealing may be presumed.

¹ *R. v. St. Paul's Covent Garden*, 7 Q. B. 232; *Woods v. Banks*, 14 N. H. 101; *Devling v. Williamson*, 9 Watts, 311; *Cromwell v. Tate*, 7 Leigh, 301; *Underwood v. Dollins*, 47 Mo. 259. In New York by statute (2 Fay Stat. 13), public seals may be made by a stamp on paper, but private seals "shall be made as heretofore on wafer, wax, or some similar substance."

² *Davidson v. Cooper*, 11 M. & W. 778; *Pillow v. Roberts*, 13 How. 472; *Woodman v. R. R.*, 50 Me. 549; *Hendee v. Pinkerton*, 14 Allen, 381; *Curtis v. Leavitt*, 15 N. Y. 9; *Corrigan v. Falls Co.*, 3 Halst. Ch. 489.

³ *Bates v. R. R.*, 10 Allen, 251.

⁴ *Ball v. Dunsterville*, 4 T. R. 313; *Tasker v. Bartlett*, 5 Cush. 359; *Tunford v. Lead Co.*, 54 Mo. 426; *Leake*, 2d ed. 136.

⁵ *Wh. on Ag.* §§ 59 *et seq.*; *Wh. on Ev.* § 694; *supra*, §§ 128 *et seq.*

⁶ *Ibid.*; see *Chilton v. People*, 66 Ill. 501; *supra*, § 134.

⁷ *Wh. on Ev.* § 1314; *Talbot v. Hodson*, 7 Taunt. 251; *Fassett v. Brown*, Peake, 23; *Burdett v. Spillsbury*, 6 M. & G. 386; 10 Cl. & F. 340; *Hall v. Bainbridge*, 12 Q. B. 699; *Sandilands in re*, L. R. 6 C. P. 411; *Ward v. Lewis*, 4 Pick. 518; *Vernol v. Vernol*, 63 N. Y. 45. See *Flowery Mining Co. v. Mining Co.*, 16 Nev. 302. Acknowledging and delivering validates a deed, no matter by whom the grantor's name and seal were affixed; and after acknowledgment and delivery he cannot deny his signature and seal. *Clough v. Clough*, 73 Me. 487, citing *Bartlett v. Deake*, 100 Mass. 174.

⁸ *Xenos v. Wickham*, L. R. 2 H. L. 296.

§ 682. By an arbitrary rule of the common law, a seal, as we have already seen,¹ imports consideration, and in a suit on a sealed instrument a consideration need not be proved. The reason sometimes given is that affixing a seal implies greater deliberation than does attaching a signature, and that when a party deliberately determines to make a gift he should be permitted so to do. So far as concerns the supposed deliberation attending the using of a seal, the distinction is without reason. A scroll in the shape of a seal is more easily made than a name is signed; and a seal may be stamped on wax even more easily than a scroll can be made. If, however, it is generally understood that a sealed promise does not require a consideration, then persons wishing to make a promise without consideration will resort to a seal for the purpose; and the validity of the promise will rest on the position, that where a party desires to bind himself without consideration he should be permitted to do so if he use the proper terms.² The unreasonableness of the distinction between sealed and unsealed documents, however, has led to important modifications of the principle that a sealed document imports consideration while an unsealed document does not. In the first place, commercial paper is taken out of the rule. It is not sealed, yet on suing on it consideration need not be proved. In the second place, while some consid-

¹ *Supra*, § 495.

² Plowden, 308, speaks as follows: "Because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. But where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of the deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and lastly he delivers the writing as his deed, which is the consum-

mation of his resolution." This is adopted as the reason of the distinction by Leake, 2d ed. 147, following Wilmot, J., in *Pillens v. Microp*, 3 Burr. 1670; *Fallowes v. Taylor*, 7 T. R. 475. But the truth is there are few documents which require so little time and deliberation as do bonds, powers of attorney, and transfers of stock. A printed form is filled up by the insertion of a few written words, and a seal which may be a mere wafer or even a written scroll is attached with less deliberation, so far at least as the time is concerned, than would be required to write a name. A different explanation is given in *Holmes's Common Law*, 134, 254, 258.

eration must be proved, with this exception, on suing on an unsealed document, the amount of the consideration is of no consequence unless the question of fraud be raised; and though a man cannot bargain away his property for nothing, yet he can sell it for a price which is virtually giving it away. In the third place, a court of equity, while it regards a sealed grant as binding without consideration, will not, should the donor in such a grant desire to retreat from it, compel him to consummate it by a specific performance. A sealed contract will not be rescinded because it is without consideration, but it will not be enforced when it is without consideration.¹

§ 683. A party claiming under a sealed covenant is bound by the general character of the consideration stated in the document. He cannot, for instance, if money be averred, prove natural love and affection; or if natural love and affection be averred, prove money.² Yet where a deed is assailed by third parties on ground of fraud, it is admissible, in order to sustain the deed, to show a valuable consideration paid; and it is also admissible for an adverse party to attack the averment of consideration.³

Consideration cannot be disputed by those claiming under deed.

¹ Leake, 2d ed. 147; Jefferys v. Jefferys, Cr. & Ph. 138; and cases cited *supra*, § 495; Kekewich v. Manning, 1 D. M. & G. 176. It was said in this case that a "voluntary covenant, though under seal, in equity, where at least the covenantor is living, or where specific performance of such a covenant is sought, . . . stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed." As authorities to the position that sealed contracts bind without consideration, see Irons v. Smallpiece, 2 B. & Ald. 551; Fallowes v. Taylor, 7 T. R. 475; Farrington v. Barr, 36 N. H. 86; Graves v. Graves, 29 N. H. 129; Trafton v. Howes, 102 Mass. 533; Center v. Billingham, 1 Cow. 33; Dale

v. Roosevelt, 9 Cow. 307; Guy v. McLean, 1 Dev. 46.

² Peacock v. Monk, 1 Ves. Sen. 128; Gale v. Williamson, 8 M. & W. 408; Morse v. Shattuck, 4 N. H. 229; Holbrook v. Holbrook, 30 Vt. 432; Morris Canal Co. v. Ryerson, 27 N. J. L. 457; Clagett v. Hall, 9 Gill & J. 80.

³ Filmer v. Gott, 4 Br. P. C. 230; Clifford v. Turrell, 1 Y. & C. 138; Brown v. Lunt, 37 Me. 423; Abbott v. Marshall, 48 Me. 44; Wait v. Wait, 28 Vt. 350; Lewis v. Brewster, 57 Penn. St. 410; Potter v. Everitt, 7 Ired. Eq. 152; Hair v. Little, 28 Ala. 236; Eystra v. Capella, 61 Mo. 578; and see other cases cited Wh. on Ev. §§ 923-8, 1046-7.

§ 684. As "simple" contracts at common law are to be considered all contracts not under seal; and whether such contracts are written or unwritten, they fall under the general term of *parol*.¹ The distinction between the two classes of documents as to consideration has been already noticed.² It is also to be observed that the supposed superior solemnity and dignity of sealed documents have led to the rule that when such a document is executed, it absorbs all prior bargaining directed to the same object. This doctrine, however, is not peculiar to sealed documents. No matter how complex and deliberate may have been the negotiations preliminary to a written contract, those negotiations are regarded as all merged in the contract.³ With respect to sealed documents the process is carried a step further, and it is held that when a sealed obligation is given for a debt already secured by an unsealed writing, the unsealed is merged in the sealed document.⁴ But this supposes the sealed document to give the better security. If it do not (as might be the case when the unsealed document is attended by collaterals which the sealed document does not carry) then there should be no merger.⁵ Hence on the one side articles of agreement for a sale are merged in the deed of sale;⁶ and on the other side there is no merger on collateral matters not included in the matured deed, but included in the preparatory documents, and

¹ *Rann v. Hughes*, 7 L. R. 350 n.; *Beckham v. Drake*, 9 M. & W. 92; *Stackpole v. Arnold*, 11 Mass. 30; *Cook v. Bradley*, 7 Conn. 57; *Burnett v. Biscoe*, 4 John. 235; *Perrine v. Cheeseman*, 6 Halst. 174; see observations, *supra*, § 642, as to ambiguity of term "*parol*."

² *Supra*, §§ 495, 682.

³ Wh. on Ev. § 1014, and see *supra*, § 5.

⁴ *Matters v. Brown*, 1 H. & C. 686; *Drake v. Mitchell*, 3 East, 251; *Ban-orgee v. Hovey*, 5 Mass. 11. A bond, therefore, taken from a partner, extinguishes a debt due from the part-

nership; *Clemens v. Brush*, 3 John. Cas. 180; *Tom v. Goodrich*, 2 John. 213; *Andrews v. Smith*, 9 Wend. 53; *Hoskinson v. Elliott*, 62 Penn. St. 393; *Bennett v. Caldwell*, 70 Penn. St. 253; see *infra*, §§ 852, 1039.

⁵ See generally *Twopenny v. Young*, 3 B. & C. 210; 5 D. & R. 262; *Ward v. Johnson*, 13 Mass. 148.

⁶ *Williams v. Hathaway*, 19 Pick. 387; *Witbeck v. Waine*, 16 N. Y. 532; *Jones v. Johnson*, 3 W. & S. 276; *Jones v. Wood*, 16 Penn. St. 25; *Carter v. Beck*, 40 Ala. 599; see other cases in 1 Ch. on Cont. 11th ed. 9; and see *supra*, § 5 *et seq.*

meant to be retained.¹ Nor does a simple contract merge in a specialty given merely as collateral security.²

§ 685. The distinction between sealed and unsealed documents, so far as concerns the statute of limitations, is still, in England and in most of our states, preserved. To a simple obligation the statute assigns six years as the period after which, unless renewed by acknowledgment, it ceases to be of force; while to contracts under seal the period assigned by the common law is twenty years, though before that period the presumption of payment from lapse of time may be applicable if there be other circumstances tending to this conclusion.³ And while there is a great variety of legislation in our states in respect to limitations of debts, debts by specialty have assigned to them in most jurisdictions a more extended term of vitality than other debts. — Aside from statutes of limitation, a bond, if unpaid and unacknowledged for twenty years, is irrebuttably presumed to have been paid.⁴

Sealed obligations have longer limitations than unsealed.

§ 686. At common law, specialty creditors (*i. e.*, creditors secured by obligations under seal) had a priority over other creditors in the distribution of decedents' estates. This priority is now by statute abolished in England,⁵ and is not recognized in the United States, either in the distribution of decedent or of insolvent estates. Nor have we in this country recognized the common law rule making a seal necessary to charging of a debt on the real assets of a deceased debtor. And in England this distinction no longer exists.⁶

No priority to specialty debts.

§ 687. An alteration of a deed after its execution works its avoidance.⁷ If a blank is to be filled in, there must be, in all material matters, a new execution and

Alteration after execution.

¹ *Witbeck v. Waine*, 16 N. Y. 535; *Long v. Hartwell*, 5 Vroom L. 116; *Cox v. Henry*, 32 Penn. St. 18.

² *Drake v. Mitchell*, 3 East, 251; *Twopenny v. Young*, 3 B. & C. 210; *Solly v. Forbes*, 2 B. & B. 38; *Banorjee v. Hovey*, 5 Mass. 11; *Charles v. Scott*, 1 S. & R. 294; and cases above cited. See also cases cited *infra*, § 1039.

³ *Leake*, 2d ed. 967.

⁴ *Wh. on Ev.* § 1360, and cases there cited.

⁵ *Leake*, 2d ed. 148.

⁶ *Leake*, 2d ed. 149. As to common law, see 2 Black. Com. 463.

⁷ *Infra*, § 695; *Powell v. Duff*, 3 Camp. 181; *Cambridge Bank v. Hyde*, 131 Mass. 77.

tion avoids; delivery.¹ Without such new execution and delivery, filling in the deed is avoided by a material alteration.² Thus, blanks. where a deed of composition was made between a debtor and certain creditors whose names, it was alleged in the deed, were given in a schedule, but the schedule was not attached until after execution and registration, the deed was held to be void.³ A bond, also, issued by a company, in which the name of the payee was not introduced until after the delivery of the bond, was held void.⁴ A transfer of shares with blanks as to the names of the purchasers and as to the number of the shares, has been held in England not to be susceptible of validation, after delivery, by filling the blanks through the agency of a third party in the absence of the assignor; and it was held that the practice of the London stock exchange, for sellers to deliver transfers in blank, the blanks to be filled by the purchasing broker, could not be put in evidence to modify this rule.⁵ But where a deed would be operative without a schedule, and the schedule only goes to explain in detail latent obscurities, the attaching the schedule does not invalidate.⁶ Thus, an assignment for the benefit of creditors was held not to be invalidated by the omission of a schedule of creditors, when the assignee's name is properly given and the trusts properly described.⁷ And where a deed is not necessary for the transfer of shares, a transferee may fill in the blanks of a transfer and thus take the title.⁸

§ 688. An acceptance of a contract under seal is inferred from the contract coming into the hands of the party benefited. In order to sue, therefore, on the con-

¹ *Hibblewhite v. M'Morine*, 6 M. & W. 200.

² *Infra*, §§ 695 *et seq.*

³ *Sellin v. Price*, L. R. 2 Ex. 189; *Wood v. Slack*, L. R. 3 Q. B. 379. See for similar ruling on omission of schedule, *Weeks v. Maillardet*, 14 East, 568, and other cases cited *infra*, §§ 695 *et seq.*

⁴ *Enthoven v. Hoyle*, 13 C. B. 373. See *infra*, §§ 695 *et seq.*

⁵ *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Taylor v. R. R.*, 4 D. & J. 559; *Swan v. Land Co.*, 2 H. & C. 175; see *infra*, §§ 695 *et seq.*

⁶ *Harrhy v. Wall*, 1 B. & Ald. 103. As to schedule, see further *infra*, § 696.

⁷ *West v. Steward*, 14 M. & W. 47.

⁸ *Leake*, 2d ed. 140, citing *Sargent ex parte*, L. R. 17 Eq. 273; *Mavino's case*, L. R. 2 Ch. 596; *Ortigosa v. Brown*, 47 L. J. C. 168.

tract, it is not necessary for him to notify the grantor of his acceptance, or even to execute the deed.¹ Even where a deed contains covenants on both sides, the covenants on one side being in consideration of the covenants on the other side, the party executing the deed may be bound, although the other party has not executed the deed. "The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself never did; for he is a party, although he did not execute, and parties to an indenture may sue though strangers cannot; and it makes no difference that the covenants of the defendant are therein stated to be in *consideration* of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration."² But when the covenants made by the party first executing the deed are dependent on covenants to be executed by the other party, then the first class of covenants cannot be enforced until the performance of the correlative covenants, or at least until that performance is undertaken by the execution of the deed by the other party.³ Thus, "with respect to leases by indenture, the covenants which depend on the interest in the lease, and are made because the covenantor has that interest—such as those to repair and pay rent during the term—are not obligatory, if the lessor does not execute, not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate; the foundation of the covenant failing, the covenant fails also. Unless there be a term, a covenant to repair *during it* is void. But with respect to collateral covenants not depending on the interest in the land, it is otherwise, and they are obligatory."⁴

though
other party
has not
executed.

¹ Leake, 2d ed. 140; *Petrie v. Bury*, 3 B. & C. 353; *Rose v. Poulton*, 2 B. & Ad. 822; *Northampton Gas Co. v. Parnell*, 15 C. B. 630; *Macdonald v. Ins. Co.*, L. R. 9 Q. B. 332.

² Per cur. in *Pitman v. Woodbury*, 3 Ex. 11, adopted in Leake, 2d ed. 141.

³ Leake, 2d ed. 141.

⁴ Per cur. in *Pitman v. Woodbury*, 3 Ex. 11, dissenting from *Cooch v. Goodman*, 2 Q. B. 580, and adopted in Leake, 2d ed. 141.

§ 689. In the common money bond, the obligor binds himself in double the amount of the debt to pay the debt at a particular day, the condition being that in case of such payment the cautionary amount shall not be due. But bonds with penalties are not limited to money conditions. Other conditions, such as special acts to be done by the obligor or by third parties, may be introduced. But whatever may be the conditions, courts of equity have always refused to permit the penalty to be exacted if the condition was performed, and in case of failure to perform the condition in bonds for payment of money, have limited the amount to be collected to the principal debt with interest. And by statute of 4 & 5 Anne, c. 16, in force in several jurisdictions in the United States, and adopted as part of the common law in other jurisdictions, it is provided that "where an action is brought on any bond which hath a condition to make void the same upon payment of a lesser sum at day or place certain, if the obligor have, before the action brought, paid to the obligee the principal and interest due by the condition, though such payment was not made according to the condition, yet it shall and may be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition." And by section 13, the defendant may pay into court the principal money and interest, with costs, in satisfaction of the bond. Under this and subsequent statutes, a bond with a condition creates a debt payable only on breach of the condition, and in an action on the bond a plea that the condition had not been broken is good in bar of the suit.¹ And in equity, bonds with special conditions are regarded as being directed exclusively to the performance of the condition, and the obligee will not be permitted, whenever the condition can be performed under the direction of the court, to turn into a claim for the penalty his right to have the condition performed.²

¹ *Milbourn v. Ewart*, 5 T. R. 381; *Watson*, 1 Gray, 561; *Lindesay v. Hinton v. Acraman*, 2 C. B. 367; *Beswick v. Swindalis*, 3 A. & E. 868; *Taylor v. Sandiford*, 7 Wheat. 13; *Wallis v. Carpenter*, 13 Allen, 19; *Dewey v.*

Amesley, 6 Ired. 186.
² *Leake*, 2d ed. 146; *Chilliner v. Chilliner*, 2 Ves. Sen. 528.

§ 690. As is elsewhere fully seen, a specialty may be modified or rescinded by parol if there be no statutory inhibition, supposing that in this way the mutual intention of the parties is effected, and supposing that the rights of third parties are not affected.¹

Specialty may be modified or rescinded by parol.

§ 691. The rules for the construction of sealed documents are the same as those which obtain for the construction of other documents.²

Rules of construction the same as for other documents.

¹ See Wh. on Ev. §§ 1050 *et seq.*

See *Brown v. Brine*, L. R. 1 Ex. D. 5; *Story Eq. Jur.* §§ 736-47; *Doloret v. Canal Co. v. Ray*, 101 U. S. 502.

² See fully *supra*, §§ 627 *et seq.*; 2 *Rothschild*, 1 Sim. & St. 590.

CHAPTER XXI.

LOST AND ALTERED CONTRACTS.

Lost contracts may be enforced on parol proof, § 694.	Adverse parties not to be prejudiced by alteration, § 699.
Material alteration in favor of custo- dian of paper precludes him from benefiting by it, § 695.	Rule as to negotiable paper, § 700. As to policies of insurance, § 701.
Alterations are material when tending to benefit party making them, § 696.	Alteration by stranger does not vitiate, § 702.
Alterations made during negotiations do not invalidate, § 697.	So of accidental alteration, § 703. Vested rights not affected, § 704.
Burden on party producing altered writing, § 698.	Alterations by consent when express- ing change of intention start a new contract, § 705. ✓

§ 694. A WRITTEN contract when lost or destroyed may be proved by parol, and the contract as thus reproduced, supposing its terms can be established, is as much a basis for suit as would be the original document.¹—An exception exists in this respect with regard to negotiable paper. To the *bona fide* holder of such paper the fact that it had been intermediately lost is no defence; hence, parties sued on a lost bill or note are entitled to require that they should be indemnified as to any subsequent suit by parties by whom the missing paper should be produced.² And, though the rule does not apply to non-negotiable paper,³ it applies to negotiable paper payable to order though not yet endorsed.⁴ But a court of equity will compel payment on lost negotiable paper on sufficient indemnity being tendered;⁵ and in England, by the common law procedure act, the loss of a negotiable instrument does not

¹ Wh. on Ev. §§ 129, 150.

v. Clough, 41 N. H. 290; Spencer v.

² Davis v. Dodd, 4 Taunt. 602; Hansard v. Robinson, 7 B. & C. 90.

Dearth, 43 Vt. 98.

³ Wain v. Bailey, 10 A. & E. 616.⁵ Leake, 2d ed. 819; Byles on Bills, 9th ed. 365; Hansard v. Robinson, 7⁴ Ramuz v. Crowe, 1 Ex. 167; Stone

B. & Cr. 95.

preclude suit being brought on it in all cases where the plaintiff tenders indemnity.¹—On destroyed paper an action can be maintained,² and in Massachusetts destroyed bills are placed in the same position as those that are lost.³

§ 695. A written contract is avoided by material alterations made in it when in the hands of the party interested in the change. The rule, as originally adopted, was meant to prevent fraud. A party who either makes or negligently permits an alteration to be made in his favor in a document in his custody, ought to be precluded from taking anything under the document so altered. He may have acted without guile, but at the best he acted improvidently, and justice is in the long run promoted by saying, that to tamper in one's own favor with a muniment of title makes it totally inoperative. It is true that in respect to contracts recorded under our registry statutes this reasoning loses much of its force. But to documents of all classes, so far as they are relied on for title, the rule may be held applicable.⁴ The principle is that while alterations by accident or by the interference of others, will not, as we will presently see, prejudice a party holding a document, yet a party making or permitting an alteration in his own favor in a document held by him should not be allowed to avail himself of such document.⁵ Were

Material alteration in favor of custodian of paper precludes him from benefiting by it.

¹ Leake, 2d ed. 819.

² Story on Notes, § 107.

³ *McGregory v. McGregor*, 107 Mass. 543.

⁴ Wh. on Ev. §§ 621 *et seq.*; Leake on Cont. 2d ed. 805; *Falmouth v. Roberts*, 9 M. & W. 471; *Parry v. Nicholson*, 13 M. & W. 779; *Davidson v. Cooper*, 13 M. & W. 352; *Powell v. Divett*, 15 East, 29; *Thornton v. Appleton*, 29 Me. 298; *Bassett v. Bassett*, 55 Me. 125; *Lewis v. Payn*, 8 Cow. 71; *Wright v. Wright*, 2 Halst. 175; *Boalt v. Brown*, 13 Oh. St. 364.

⁵ See *Adams v. Frye*, 3 Met. Mass. 103, where it was held that the addition of the name of a subscribing wit-

ness by the obligee of a bond avoided it as against the obligor. "It seems to us," said Dewey, J., "that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity. But such would be the necessary consequence of an adjudication, that the subsequent addition of the name of an attesting witness, without the privity or consent of the obligee, is not a material alteration of the instrument, and would under no circumstances affect its validity." See, as sustaining the text, *Smith v. U. S.*, 2 Wall. 219; *Miller v. Stewart*, 4 Wash. C. C. 26; *Brackett v. Mount-*

this rule not maintained, a party holding a document might make or connive at material alterations in the terms, and then take the chance of the alterations being detected, losing nothing if he fail in establishing them, and gaining the fruits of his fraud if he succeed.¹ So highly is such spoliation reprobated, that a person who materially and designedly alters in his own favor a document is precluded from ever putting such document in evidence.²

§ 696. Whether an alteration is so material as to avoid a contract under the rule above given, depends upon the bearing of the alteration on the interests of the party who makes or permits the alteration.³ It has been held that where a composition deed, under the English bankruptcy act, purported to embrace all the creditors, and was adequately executed by a sufficient majority under the statute, the subsequent addition of the names of other creditors in the schedule, this in no wise affecting the document, was not a material alteration;⁴ though it is otherwise when the schedule itself is added after execution and registration.⁵ Adding a seal, so as to give, if valid, additional force to a contract, avoids it;⁶ and so does the intro-

Alterations
are mate-
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fort, 2 Fairf. 115; Martendale v. Follet, 1 N. H. 95; Bowers v. Jewell, 2 N. H. 543; Langdon v. Paul, 20 Vt. 217; Smith v. Crooker, 5 Mass. 538; Doane v. Eldridge, 16 Gray, 254; Stoddardt v. Penniman, 108 Mass. 366; Draper v. Wood, 112 Mass. 315; Booth v. Powers, 56 N. Y. 22; Churchman v. Smith, 6 Whart. 146; Hill v. Cooley, 46 Penn. St. 259; Farmers' Ins. Co. v. Bair, 82 Penn. St. 33; Carr v. Welch, 46 Ill. 88; Benedict v. Miner, 58 Ill. 19; Dietz v. Harder, 72 Ind. 208; Comstock v. Smith, 26 Mich. 306; Vaughan v. Fowler, 14 S. C. 355; Doster v. Brown, 25 Ga. 24; Washington Bk. v. Ecky, 51 Mo. 272; Thornton v. Appleton, 29 Me. 208; Goodman v. Eastman, 4 N. H. 455; Cape Ann Nat. Bk. v. Burns, 129 Mass. 596; McGrath v. Clark, 56 N. Y. 34; Babb v. Clemson, 10 S. & R. 419; Marshall v. Gougler, 10 S. & R. 164; Kountz v. Kennedy, 63 Penn. St. 187; Holmes v. Trumper, 22 Mich. 427; Brooks v. Allen, 62 Ind. 401; Newell v. Mayberry, 3 Leigh, 250; Mills v. Starr, 2 Bailey, 359; Toomer v. Rutland, 57 Ala. 379.

³ See Wh. on Ev. § 622; Leake, 807; Hutchins v. Scott, 2 M. & W. 809; Vance v. Lowther, L. R. 1 Ex. D. 176; Smith v. Crooker, 5 Mass. 539; Neff v. Horner, 63 Penn. St. 327.

¹ Wh. on Ev. § 629.

⁴ Wood v. Slack, L. R. 3 Q. B. 379.

² Ibid.; Martendale v. Follet, 1 N. H. 95; Angle v. Ins. Co., 92 U. S. 330; Jewett v. Hodgden, 3 Greenl. 103;

⁵ Sallin v. Price, L. R. 2 Ex. 189.

⁶ Davidson v. Cooper, 13 M. & W. 343.

duction of a qualification enhancing the value of the property passing by the contract.¹ As immaterial have been held the alteration of a name in a recital, the object being merely greater accuracy, without in any way enlarging liability;² the insertion of "or bearer" in place of "or order," in a case where it did not at all appear that this varied the rights of the parties;³ the adding the words "on demand" to a promissory note;⁴ the addition of a harmless designation (*e. g.* "sheriff of the county") to a name;⁵ the correction of an obvious error;⁶ the insertion of a word which was so obviously dropped out in engrossing that the court in construing the passage would have regarded the word as understood;⁷ and the interlining innocently of explanatory words, in no wise affecting the sense.⁸ The rule, it is said, is applicable even to cases where the alteration was made *bona fide*, but without the consent of the opposite party; and this is rightfully the case when one party makes a material alteration in his own favor in the body of a document after it has been duly executed and delivered.⁹ But such is not the case with alterations which do not go to the body of the document. Thus, where the name of a witness

¹ Leake, 2d ed. 807; *Powell v. Divett*, 15 East, 29; *Mollatt v. Wackerboth*, 5 C. B. 181.

² *Trew v. Burton*, 1 C. & M. 533.

³ *Flint v. Craig*, 59 Barb. 319; and other cases *infra*, § 699.

⁴ *Aldous v. Cornwell*, L. R. 3 Q. B. 573.

⁵ *Pigot's case*, 11 Co. 26 b.

⁶ *Hutchins v. Scott*, 2 M. & W. 809.

⁷ *Waugh v. Russell*, 5 Taunt. 707; *Hale v. Russ*, 1 Greenl. 334; *Knapp v. Maltby*, 13 Wend. 587.

⁸ *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Falmouth v. Roberts*, 9 M. & W. 469; *Hutchins v. Scott*, 2 M. & W. 809; *Hunt v. Adams*, 6 Mass. 519; *Brown v. Pinkham*, 18 Pick. 172. That when the alterations are immaterial they do not avoid, see *Bluck v. Gompertz*, 7 Exch. R. 862; *Keane v. Smallbone*, 17 C. B. 179; *Waugh v.*

Russell, 5 Taunt. 707; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Major v. Hansen*, 2 Biss. 195; *Littlefield v. Coombs*, 71 Me. 110; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Smith v. Crooker*, 5 Mass. 538; *Brown v. Pinkham*, 18 Pick. 172; *Kountz v. Kennedy*, 63 Penn. St. 187; *Kimmel's App.*, 91 Penn. St. 471; *Robertson v. Hay*, 91 Penn. St. 242; *Herrick v. Baldwin*, 17 Minn. 209; *Allen v. Sales*, 56 Mo. 28; and so when the alteration, though material, does not affect the liability of the party sued to the party suing. *Hutchins v. Scott*, 2 M. & W. 809; *Falmouth v. Roberts*, 9 M. & W. 471; *Davidson v. Cooper*, 13 M. & W. 343; *Ward v. Lumley*, 5 H. & N. 87; *U. S. v. Spalding*, 2 Mason, 478.

⁹ See *Bank of Hindustan v. Smith*, 36 L. J. C. P. 241.

was added to a bond, Dewey, J., while saying that the alteration was undoubtedly material, on the ground that "by adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court;" added: "But we think that it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would in all cases discharge the obligor from the performance of his contract or obligation. If an alteration like that which was made in the present case can be shown to have been made honestly, if it can be reasonably accounted for as done under some misapprehension or mistake, or with the supposed assent of the obligor, it should not operate to avoid the obligation. But, on the other hand, if fraudulently done, and with a view to gain any improper advantage, it is right and proper that the fraudulent party should lose wholly the right to enforce his original contract in a court of law."¹ The test is, intent to defraud; and of this, materiality is an important factor. If immaterial, an intent to defraud will not be inferred. And even if material, the document will not be necessarily vitiated where there was no fraudulent intent.²—An alteration in the number of a note issued by the bank of England, it has been held, does not avoid the note so as to enable the bank to refuse payment to a *bona fide* purchaser without notice.³

¹ Adams v. Frye, 3 Met. 103.

² Ibid.; Thornton v. Appleton, 29 Me. 298; Willard v. Clark, 7 Met. 435; Marshall v. Gougler, 10 S. & R. 164.

³ Suffell v. Bank, L. R. 7 Q. B. D. 270. "The leading authority," said Lord Coleridge, C. J., "on the subject is the well-known case of Master v. Miller, 4 T. Rep. 320; in error, 2 Hen. Bl. 141. There an unauthorized alteration in a bill of exchange, whereby the day of payment was accelerated, was held to avoid the instrument, even as against the innocent holder for value. The nature of the alteration, and therefore

the original contract, being capable of proof, made no difference in the opinion of the judges. Buller, J., dissented, and I think was overruled rather than answered by the majority who decided the case, but so is the law; and there is no doubt that the breadth of the language both of Lord Kenyon and Eyre, C. J., taken literally, would cover this case. But it has always been held that the alteration which vitiates the instrument must be a material alteration, *i. e.*, must be one which alters or attempts to alter the character of the instrument itself, and

§ 697. When there are several parties to a contract, by some of whom it has been already signed, alterations as to the obligations of parties who have not yet signed may be made prior to their signatures without affecting the liabilities of the parties who have already signed. Whenever the document is divisible as to the parties signing, the part relating to each party may for this purpose be considered an independent obligation.¹ A document delivered as an escrow, also, may be altered so that the rights of prior non-consenting parties are not thereby affected;² and a grantor who retains control of a deed, either actually or constructively, may be understood to reserve the

Alterations made during negotiations do not invalidate.

which affects, or may affect, the contract which the instrument contains, or is evidence of. *Sanderson v. Symonds*, 1 B. & B. 426, and *Aldous v. Cornwell*, L. Rep. 3 Q. B. 573; 37 L. J. 201, Q. B., are clear authorities to show that an immaterial alteration will not do. My brother Lush, in his excellent judgment in *Aldous v. Cornwell*, *ubi supra*, says that the decision in *Sanderson v. Symonds*, *ubi supra*, was confined by the judges to policies of insurance. There are expressions in the judgments of the lord chief justice and Park, J., which support his view—and the instrument in question was a policy. But the language of the judges, I think, goes beyond this; and Richardson, J., a very great and most accurate lawyer, does not in any way qualify the generality of his language. *Catton v. Simpson*, 8 A. & E. 136, is to the same effect; and though that case was expressly overruled in *Gardner v. Walsh*, 25 L. T. 168; 5 E. & B. 83, it was so, not on the ground that an immaterial alteration avoided the instrument, but that the alteration in *Catton v. Simpson*, *ubi supra*, was material. In the sense in which the word ‘material’ has been used in all the cases I have been able to refer to, of which *Master v. Miller*, *ubi supra*, *Burchfield v. Moore*,

23 L. J. 143; 3 E. & B. 683, and *Gardner v. Walsh*, *ubi supra*, are only examples, the alteration has been held material because it varied, or attempted to vary, the contract. Here the alteration is nothing of the sort. It is material in the popular sense, because it interposes some difficulty in the way of the Bank of England detecting, or helping to detect, the original fraud, by making it harder to trace the notes or stop them at the bank. But this is wholly a collateral matter. An alteration in this popular and collateral sense has never yet been held to vitiate an instrument in the hands of an innocent holder; Sir John Holker admitted this in fact, but urged that the generality of the words in *Master v. Miller*, *ubi supra*, was wide enough to take in this case, and that it was wise so to extend them. I do not think so, and I must decline the invitation.”

¹ *Lewis v. Bingham*, 4 B. & Ald. 672; *Hall v. Chandless*, 4 Bing. 123; *Davidson v. Cooper*, 11 M. & W. 802; *West v. Steward*, 14 M. & W. 47; *Little v. Herndon*, 10 Wall. 26; *Bernstien v. Ricks*, 20 La. An. 409; *Blake v. Coleman*, 22 Wis. 415.

² *West v. Steward*, 14 M. & W. 49; *Gudgen v. Bassett*, 6 E. & B. 986. As to escrow, see *supra*, § 679.

right to alter, with notice to the other parties, the document, even though already signed by himself, at any time before it passes from him by delivery.¹

§ 698. When a document contains interlineations and alterations, on their face trivial or tending merely to clear an obvious obscurity, the burden of proving bad faith is on the party setting up bad faith. On the other hand, the burden of explaining a suspicious alteration is on the party relying on the document as altered.² In negotiable paper this is eminently the case; the burden being on the party producing such paper on its face altered, to explain the alteration.³ When the execu-

Burden on party producing altered writing.

¹ Wh. on Ev. § 625; Jones v. Jones, 1 C. & M. 721; Garnons v. Knight, 5 B. & C. 671; Xenos v. Wickham, L. R. 2 H. L. 296; Richards v. Lewis, 11 C. B. 1046; Little v. Herndon, 10 Wall. 26. In Keen v. Monroe, 75 Va. 424, we have the following in the opinion of Anderson, J. "Whether alterations were made or not after the signing, sealing, and delivery of the instrument, without the knowledge or consent of the obligor, is a question of fact, which may properly be submitted to the jury; but whether such alterations were material or not, is a question of law to be decided by the court. Steele's Lessee v. Spencer, 1 Peters R. 552; Stephens v. Graham, 7 Serg. & R. 505; Bowers v. Jewell, 2 N. Hamp. R. 543." "If the deed can be enforced without filling the blank, filling it is immaterial. Eagleton v. Gutteridge, 11 Mees. & Welsb. 465; Smith v. Crooker, 5 Mass. R. 538; 2 Rob. Prac. (new), 15. See also Ross v. Overton, 3 Call, 309, and Whiting v. Daniel, 1 Hen. & Mumf. 391."

² Wh. on Ev. §§ 621, 629; Leake, 2d ed. 813; Clifford v. Parker, 2 M. & G. 909; Simmons v. Rudall, 1 Sim. N. S. 136; Sibley v. Fisher, 7 A. & E. 444; Miller v. Stewart, 4 Wash. C. C. 26; Wood v. Steele, 6 Wall. 80; Boothly v. Stanley, 34 Me. 515; Ches-

ley v. Frost, 1 N. H. 145; Davis v. Jenney, 1 Met. Mass. 221; Vose v. Dolan, 108 Mass. 155; Bailey v. Taylor, 11 Conn. 531; Jackson v. Jacoby, 9 Cow. 125; Herrick v. Malin, 22 Wend. 388; Simpson v. Stackhouse, 9 Barr, 186; Farmers' Ins. Co. v. Blair, 82 Penn. St. 33; Ramsey v. McCue, 21 Grat. 349; Johnson v. McGahee, 1 Ala. 186; McCormick v. Fitzmorris, 39 Mo. 24; Munroe v. Eastman, 31 Mich. 23; Page v. Danaher, 43 Wis. 221; North v. Henneberry, 44 Wis. 306; Muckleroy v. Bethany, 27 Tex. 551; as to presumptions in such cases, see Wh. on Ev. §§ 621-9, 1313.

³ *Infra*, § 700; Knight v. Clements, 8 Ad. & El. 215; Hills v. Barnes, 11 N. H. 395; Humphreys v. Guillo, 13 N. H. 385; Simpson v. Stackhouse, 9 Barr, 186; Davis v. Carlisle, 6 Ala. 707; Commer. Bk. v. Lum, 7 How. (Miss.) 414; see Clifford v. Parker, 2 M. & G. 909; Cariss v. Tattersall, 2 M. & G. 890; Taylor v. Moseley, 6 C. & P. 273; Gardner v. Walsh, 5 E. & B. 83. The Roman law, assuming that a party would not be likely to sign a dispositive document containing important interlineations and corrections without an explanatory memorandum, before signature, throws on the party producing such a document the burden of proving

tion of altered negotiable paper is denied, and the alteration on its face is suspicious, the burden is on the plaintiff to prove the paper was executed after the alteration, or that the alteration was agreed to by the defendant¹ Whether the proof shows that the alteration was made before execution of the document, or whether, if made afterwards, it was made with the consent of the other party, is a question of fact, to be determined by all the circumstances of the case, unfettered by any presumption of law. The burden of proof of explaining the alteration, if material, is, as has been seen, on the party producing the document; but this is because he is the actor in the matter, and not because there is any presumption of law against him. The question is one purely of fact, to be determined by preponderance of proof.² The question is, what

that such interlineations or corrections were made before signature. If, however, a right is rested on a supposed nullity, and the plaintiff claims upon the document as it stands, without such corrections, and the defendant pleads that such corrections are genuine and valid, the prevailing opinion is that if the corrections impart a new sense to the document, and are not on their face the introduction of casually omitted words, they may, *prima facie*, be disregarded. In such case the burden is on the party relying on them to prove their validity.¹

¹ *Infra*, § 700; *Wilde v. Armsby*, 6 Cush. 314; *Morris v. Bowman*, 12 Gray, 467; *Simpson v. Davis*, 119 Mass. 270; see *Bishop v. Chambre, M. & M.* 116; *Knight v. Clements*, 8 A. & E. 215; *Hill v. Cooley*, 46 Penn. St. 178, and cases cited in Wh. on Ev. § 629.

² *Bishop v. Chambre, M. & M.* 116; *Knight v. Clements*, 8 A. & E. 215; *Gooch v. Bryant*, 13 Me. 386; *Beaman v. Russell*, 20 Vt. 205; *Simpson v. Davis*, 119 Mass. 270; *Bailey v. Taylor*,

11 Conn. 531; *Penny v. Corwithe*, 18 John. 499; *Nazro v. Fuller*, 24 Wend. 374; *Cumberland Bk. v. Hall*, 1 Halst. 215; *Heffelfinger v. Shutz*, 16 S. & R. 41; *Hudson v. Reel*, 5 Barr, 279; *Hill v. Cooley*, 46 Penn. St. 178; *Wickes v. Caulk*, 5 Har. & J. 36; *Wilson v. Henderson*, 9 Sm. & M. 375; though see *Chesley v. Frost*, 1 N. H. 145.

In a learned opinion by the supreme court of Kansas in 1880, it is said that on the question of the burden of proof in such cases there are the four following distinct theories: "First, that an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; second, that it raises a presumption against the writing, and requires therefore some explanation to render it admissible; third, that it raises such a presumption when it is suspicious, otherwise not; fourth, that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance. It is impossible," it is further said, "to fix a cast-iron rule

¹ Wh. on Ev. § 621.

does the document itself show? If, on the one hand, the alteration is on its face trivial, it cannot of itself exclude the document from being admitted in evidence. If, on the other hand, the alteration is material, and of a suspicious character, it should be explained before the document is admitted in evidence.¹—Whether an *erasure* throws the burden of explanation on the party producing a document depends upon the character of the document. It would be very strange if a deed, engrossed and executed with great apparent precision, should contain erasures unnoticed in the attestation; and erasures thus unnoticed ought to be explained. It is otherwise with fragmentary memoranda and with papers not, from the nature of the case, carefully prepared.²

§ 699. The party to whose disparagement the alteration is made may sue on the contract, supposing its meaning can be ascertained and proved, to the same effect as if it had been lost or destroyed.³ He is entitled to prove what the document was before it was tam-

Adverse parties not to be prejudiced by alteration.

to control in all cases; but certainly the second rule, and the one contended for by plaintiff in error, is not the true one. Clearly, in ordinary cases the alteration ought not to raise a presumption against the instrument, because the law never presumes wrong. The question as to time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts. Generally, the instrument should be given in evidence, and in a jury case should go to the jury, upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before or at the time of the execution of the instrument. Perhaps there might be cases where the alteration is attended with such manifest circum-

stances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not of that character." *Neil v. Case*, 25 Kan. 510; to this are cited *Davis v. Jenney*, 1 Metc. 221; *Hayden v. Goodnow*, 39 Conn. 164; *Hunt v. Gray*, 35 N. J. 227; *White v. Hass*, 32 Ala. 431; *Paramore v. Lindsay*, 63 Mo. 63; *First Nat. Bank v. Franklin*, 20 Kan. 264.

¹ In *Whittlesey v. Frantz*, 74 N. Y. 456, the plaintiff relied on a stock subscription; and the paper put in evidence showed the name of a prior subscriber cancelled by lines drawn through it, and opposite to the name was written "By agree't, Mar. 5, '73," this date being subsequent to the defendant's subscription. It was held that though this alteration was unexplained at the trial, it did not by itself discharge the defendant.

² *Tyree v. Rives*, 57 Ala. 173.

³ Wh. on Ev. §§ 625 *et seq.*; *Leake*, 2d ed. 810.

pered with, since the failure to produce the original is imputable to the misconduct, not of himself, but of the opposing party.¹ If there is doubt as to the meaning, the sense less favorable to the spoliator is to be taken.² On the same reasoning, a party is not affected by alterations made without his connivance by a stranger,³ though against such stranger the presumption against spoliation does not work if it appear that the alteration was made inadvertently.

§ 700. As against a non-agreeing party, negotiable paper is avoided by any alterations tending to vary its effect, and this though the alteration was made before the paper came into the holder's hands.⁴ As having this effect, and thus avoiding the paper, is the alteration of the date;⁵ changing time of payment;⁶ changing the place of payment;⁷ inserting a place of payment in a blank;⁸ adding or varying terms as to interest;⁹ altering the medium of payment;¹⁰ adding a seal;¹¹ inserting a fixed rate of exchange;¹²

Rule as to negotiable paper.

¹ *Pattinson v. Luckley*, L. R. 10 Ex. 330.

² Wh. on Ev. §§ 1265 *et seq.*

³ *Infra*, § 702.

⁴ *Outhwaite v. Luntley*, 4 Camp. 179; *Wood v. Steele*, 6 Wall. 80; *Martendale v. Follett*, 1 N. H. 95. It should be remembered that the English cases to this effect are under the stamp act, and that alterations of a note after stamping may be regarded as conflicting with the act. But, aside from the stamp act, the principle in the text is good.

⁵ *Master v. Miller*, 4 T. R. 320; *Hirschman v. Budd*, L. R. 8 Ex. 171, qualifying *Parry v. Nicholson*, 13 M. & W. 778; *Walton v. Hastings*, 4 Camp. 223; *Cardwell v. Martin*, 9 East, 190; *Wood v. Steele*, 6 Wall. 80; *Stephens v. Graham*, 7 S. & R. 505; *Britton v. Dierker*, 46 Mo. 591. In *Vance v. Lowther*, L. R. 1 Ex. D. 176, a cheque payable to bearer on demand was held avoided by a change of date made by an agent of the payee. See *Leake*, 2d ed. 809.

⁶ *Bowman v. Nichol*, 5 T. R. 537; *Bathe v. Taylor*, 15 East, 412; *Miller v. Gilleland*, 19 Penn. St. 119; *Lewis v. Kramer*, 3 Md. 265.

⁷ *Tidmarsh v. Grover*, 1 M. & S. 735; *Southwark Bk. v. Gross*, 35 Penn. St. 80.

⁸ *Burchfield v. Moore*, 3 E. & B. 683; *Calvert v. Baker*, 4 M. & W. 417; *Crotty v. Hodges*, 4 M. & G. 561; *Toomer v. Rutland*, 57 Ala. 379.

⁹ *Warrington v. Early*, 2 E. & B. 763; *Waterman v. Vose*, 43 Me. 504; *Lee v. Starbird*, 55 Me. 491; *Fay v. Smith*, 1 Allen, 477; *McGrath v. Clark*, 56 N. Y. 34; *Neff v. Horner*, 63 Penn. St. 327; *Fulmer v. Seitz*, 68 Penn. St. 237; *Patterson v. McNeely*, 16 Oh. St. 348; *Locknane v. Emmerson*, 11 Bush, 69; *Darwin v. Rippey*, 63 N. C. 318; *Glover v. Robbins*, 49 Ala. 219; *Lamar v. Brown*, 56 Ala. 157.

¹⁰ *Dan. on Neg. Inst.* § 1349; *Martendale v. Follett*, 1 N. H. 95; *Stephens v. Graham*, 7 S. & R. 505; *Darwin v. Rippey*, 63 N. C. 318.

¹¹ *Eddy v. Bond*, 19 Me. 461.

¹² *Hirschfield v. Smith*, L. R. 1 C. P. 340.

changing "order" to "bearer;"¹ interlining "jointly and severally" before the names of the makers of a joint note;² adding an additional maker's name to a joint and several note;³ materially changing the relations of the parties;⁴ and cutting off or erasing a signature of a party to a joint and several note.⁵ It is otherwise, however, with entries which it was understood by the parties that the holder was at liberty to make, or which are only cumulative, as adding the words "on demand" when the note fixed no time for payment.⁶—An indorsee taking from an indorser whose title is vitiated by tampering with the paper is in no better position than the party from whom he takes. His only remedy is against the party from whom he took the paper, from whom he may recover the consideration paid.⁷ The party making the alteration, however, cannot recover even the consideration from his immediate indorser, because he has destroyed the remedies of the latter against prior parties; "by altering the bill in a material part he makes it his own as against the prior parties, and causes it to operate as a satisfaction of the debt for which it was originally given."⁸—An unindorsed bill for value, it should be remembered, is not complete until it is accepted and returned to the payee;⁹ and an accommodation bill is not in this sense complete, and, so far as concerns con-

¹ Union Nat. Bk. *v.* Roberts, 45 Wis. 373.

² Perring *v.* Hone, 4 Bing. 28; 12 Moore, 135; 2 C. & P. 401.

³ Gardner *v.* Walsh, 5 E. & B. 83; Wallace *v.* Jewell, 21 Oh. St. 163; Lunt *v.* Silver, 5 Mo. Ap. 186. But see, *contra*, McVean *v.* Scott, 46 Barb. 379; McCaughey *v.* Smith, 27 N. Y. 39; Miller *v.* Finley, 26 Mich. 249; see 2 Dan. on Neg. Int. § 1388.

⁴ Knill *v.* Williams, 10 East, 431; see Miller *v.* Reed, 27 Penn. St. 244.

⁵ Mason *v.* Bradley, 11 M. & W. 593; see Mahaim Bank *v.* Douglass, 31 Conn. 170; Davis *v.* Coleman, 7 Ired. 424.

⁶ Aldous *v.* Cornwell, L. R. 3 Q. B. 573; see Langdon *v.* Paul, 20 Vt. 217;

Granite R. R. *v.* Bacon, 15 Pick. 239. Clower *v.* Wynn, 59 Ga. 246. As to filling blanks, see *supra*, § 204. As to alterations by consent, see Myers *v.* Nell, 84 Penn. St. 369.

⁷ Leake, 2d ed. 811; Burchfield *v.* Moore, 3 E. & B. 683; Vance *v.* Lowther, L. R. 1 Ex. D. 176.

⁸ Leake, 2d ed. 811, citing Alderson *v.* Langdale, 3 B. & Ad. 663. A memorandum on the back of a promissory note, noting that, after a specific date, the interest on the note will be reduced, is not an alteration of the note, and does not discharge a surety of the maker. Cambridge Savings Bank *v.* Hyde, 131 Mass. 77.

⁹ Wh. on Ev. § 626; Sherrington *v.* Jermyn, 3 C. & P. 374.

senting parties, may be altered, even under the English stamp act, until it is in the hands of some person entitled to recover on it.¹—It should also be kept in mind that a party who draws a note or check so carelessly that blanks in it can be filled up, or other alterations made in it without erasure, may make himself liable to *bona fide* holders for value.²

§ 701. Policies of insurance have been held to be avoided by alterations, in the hands of the insured, changing the port of destination,³ or the time of sailing,⁴ or the description of the thing insured, so as to enlarge the insurer's liabilities.⁵ But the introduction of a harmless piece of surplusage, inserted by the insured from ignorance merely as indicating his sense of the instrument, has been held not to avoid.⁶

Rule as to policies of insurance.

§ 702. Even though the alteration be made by a stranger, it precludes the custodian from benefiting by the contract if the alteration were in his favor.⁷ "A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state."⁸ The possession of an agent is in this respect to be regarded as the possession of the principal.⁹ But it is otherwise when the alteration was made without any connivance or inculpatory negligence on the part of the custodian, and where the true meaning can be shown by extrinsic proof.¹⁰ For the old rule, that an alteration by a stranger invalidates a document,¹¹ no

Alteration by stranger does not vitiate.

¹ Tarleton v. Shingler, 7 C. B. 812.

² Garrard v. Haddan, 67 Penn. St. 82; Zimmermann v. Rote, 75 Penn. St. 191; Brown v. Reed, 79 Penn. St. 370; see Bigelow on Estoppel, 3d ed. 530, 543-4. As to filling blanks, see *supra*, §§ 185, 204.

³ Campbell v. Christie, 2 Stark. 64.

⁴ Fairlie v. Christie, 7 Taunt. 416.

⁵ Langhorn v. Cologan, 4 Taunt. 330.

⁶ Sanderson v. Symonds, 1 B. & B. 426.

⁷ Pigot's case, 11 Co. 27b; Davidson v. Cooper, 13 M. & W. 343.

⁸ Per cur. Davidson v. Cooper, 13 M.

& W. 352; Burchfield v. Moore, 3 E. & B. 687, adopted in Leake, 2d ed. 806.

⁹ Patterson v. Luckley, L. R. 10 Ex. 330; Bank of Hindustan v. Smith, 36 L. J. C. P. 241.

¹⁰ Henfree v. Bromley, 6 East, 309; Boston v. Benson, 12 Cush. 61; Nichols v. Johnson, 10 Conn. 192; Lewis v. Payn, 8 Cow. 71; Jackson v. Malin, 15 Johns. 293; Rees v. Overbaugh, 6 Cow. 746; Lee v. Alexander, 9 B. Mon. 25; Davis v. Carlisle, 6 Ala. 707; Union Nat. Bk. v. Roberts, 45 Wis. 373.

¹¹ Pigot's case, 11 Co. 27b. See Davidson v. Cooper, 13 M. & W. 778.

longer obtains in cases in which altered or defaced passages can be restored by extrinsic proof.¹

§ 703. What has been said applies to intentional alterations.

So as to
accidental
alteration.

An accidental alteration does not invalidate, for if it did, few old deeds would be valid, since there are few old deeds which are not affected by the lapse of time. Hence, that a seal has been accidentally torn off, or has lost its impress, does not invalidate;² nor does the cancelling of an acceptance by mistake;³ nor the striking off an endorsement by mistake.⁴

§ 704. An alteration of a deed, however disadvantageously

Vested
rights not
affected.

it may affect the party making or permitting it in respect to his right to use it as an executory contract, does not divest any title already vested in conformity with its provisions.⁵ Rights which the deed established cannot be divested by its subsequent alteration; and property vested under an executed contract of sale cannot be recovered back because the contract has been subsequently tampered with. The contract, after alteration, cannot be enforced in favor of the party responsible for the alteration; but the mere fact of the alteration does not operate so as to impair his title to property passing to him by it before the alteration.⁶

§ 705. Whether an alteration by consent is simply a cor-

Alterations
by consent,
when ex-
pressing
changes of
intention,
start a new
contract.

recting of the original contract, being absorbed in it, or starts a new contract, may be a question of some moment, not merely in reference to the English stamp acts, but in reference to the statute of limitations, to the applicatory local law, and to the statute of frauds.⁷ The distinction that underlies the cases is this: When the object of the alteration is simply to clear

¹ *Hutchins v. Scott*, 2 M. & W. 814; U. S. *v. Spalding*, 2 Mason, 482; *Broadwell v. Stiles*, 3 Halst. 58; *Marshall v. Gougler*, 10 S. & R. 164; *State v. Berg*, 50 Ind. 496.

² *Sandilands in re*, L. R. 6 C. P. 411; *Argoll v. Cheney*, Palm. 403; *Bolton v. Carlisle*, 2 H. Bl. 263.

³ *Novelli v. Rossi*, 2 B. & Ad. 757.

⁴ *Wilkinson v. Johnson*, 3 B. & C.

⁵ *Leake*, 2d ed. 812; *Bolton v. Bp. of Carlisle*, 2 H. Bl. 259; *West v. Steward*, 14 M. & W. 47; *Ward v. Lumley*, 5 H. & N. 656.

⁶ *Green v. Attenborough*, 3 H. & C. 468; *Shaw ex parte*, L. R. 2 Q. B. D. 463.

⁷ As to novation, see *infra*, §§ 552 et seq.

an obscurity, to fill a blank, to remove a blot, or to correct a mistake of figures, the original instrument is to be regarded as continuing in form, and the alterations as absorbed in it.¹ In other words, when the object of the alteration is to bring out the real intention of the parties at the time the original contract was executed, then the original contract remains.² But when the object of the alteration is to give effect to a change of intention subsequent to the execution of the original contract, then a new contract is started.³

¹ *Jacob v. Hart*, 6 M. & S. 142; *Byrom v. Thompson*, 11 A. & E. 31; *Hamelin v. Bruck*, 9 Q. B. 306.

² *Sutton v. Toomer*, 7 B. & C. 416; *Jacob v. Hart*, 6 M. & S. 142; *Hamelin v. Bruck*, 9 Q. B. 306; *Robinson v. Touvay*, 1 M. & S. 217; *Byrom v. Thompson*, 11 Ad. & E. 31; *Bluck v. Gompertz*, 7 Ex. 862.

³ *Bowman v. Nichol*, 5 T. R. 537; *Sutton v. Toomer*, 7 B. & C. 416; *Hill v. Patten*, 8 East, 373; *Knill v. Williams*, 10 East, 431; *Carr v. Petroleum Co.*, L. R. 1 C. P. 636; *Briggs v. R. R.*, 31 Vt. 211; *Vicary v. Moore*, 2 Watts, 451. See *infra*, §§ 852 *et seq.*

CHAPTER XXII.

IMPLIED CONTRACTS FOR SALE AND SERVICE.

Proposal and acceptance may be inferred from the facts of the case, but not to contradict written contracts, § 707.

From employment of labor, sale of goods, and bailment, § 708.

And from course of business and usage, § 709.

Proposal to guarantee involves promise to pay, § 710.

Implied promise may be raised when express is bad under statute of frauds or otherwise defective, § 711.

When, after partial delivery of goods, final delivery is prevented, vendor may sue on *indebitatus* count, § 712.

Otherwise when there is to be no payment except for aggregate, § 713.

When completion of work is prevented

by accident, *quantum meruit* may lie, § 714.

Contracts of common carriage dependent on completion, § 715.

When service is broken into by employer, back wages or damages may be recovered, § 716.

But not when this is act of employee, § 717.

Term of service dependent on circumstances, § 718.

Special promise to pay not to be implied in cases of friendly and family service, § 719.

Nor when there is a stated salary or other fixed compensation, § 720.

Vendee taking land may agree to pay burdens, § 721.

§ 707. HERETOFORE we have been mainly occupied with contracts which are either written or spoken in words on both sides capable of being definitely reproduced. A large part of business, however, is done much more informally. The contract is implied from conduct; and this in ways so multitudinous that their enumeration would be impracticable. To all of them proposal and acceptance are requisite, as otherwise there would be no contract.¹ Sometimes, however, the proposal is implied from the facts of the case; sometimes the acceptance; sometimes both.² And this implication may be from the acts of the parties, from their prior dealing, and from custom. When, however, there is established an ex-

Proposal and acceptance may be inferred from the facts of the case, but not to contradict written contract.

¹ See, however, on this point, *supra*,

² See *supra*, § 6.

press and formal contractual relation, this is to control, and it cannot be set aside and an implied contract put in its place. "There is no room for an implied contract where an express contract exists."¹ "As the law will not imply a promise, where there is an express promise, so the law will not imply a promise of any person against his express declaration; because such declaration is repugnant to any implication of a promise."² It is true, as we will see,³ when an express contract is invalid under the statute of frauds, or for other technical reasons, the substance of the contract may form the basis of a *quantum meruit*. But this is in subordination to the express contract, not in variance from it. There can be no implication in conflict with what is expressed.⁴ It is otherwise, however, as to informal memoranda and ambiguous terms whose meaning may be brought out by parol.⁵

§ 708. "When a defendant has actually received the consideration of an agreement by a voluntary performance of an act by the other party, upon his proposition and suggestion, such performance constitutes a consideration which will uphold the defendant's promise."⁶ Among the acts from which indebtedness is to be thus implied, the first to be noticed is that of employment of labor.⁷ "If I employ a person to transact any business for me or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has his remedy for this injury by bringing his action on the case upon this implied *assumpsit*. But this valuation of his trouble is submitted to the determination of a jury, who will assess

From employment of labor, sale of goods, and bailment.

¹ Met. on Con. 6; Whiting v. Sullivan, 7 Mass. 107; Massachusetts General Hosp. v. Fairbanks, 129 Mass. 78.

² Lord, J., Earle v. Coburn, 130 Mass. 596, citing Whiting v. Sullivan, 7 Mass. 107.

³ *Infra*, § 711.

⁴ 1 Ch. on Cont. 11th Am. ed. 89; Cutter v. Powell, 6 T. R. 320; Read v. Rann, 10 B. & C. 438; Van Ness v. Washington, 4 Pet. 232; Gavinzel v. Crump, 22 Wall. 308; Brown v. Spof-

ford, 95 U. S. 474; Weston v. Davis, 24 Me. 374; Worthen v. Stevens, 4 Mass. 448.

⁵ *Infra*, § 941.

⁶ Andrews, J., Marie v. Garrison, 83 N. Y. 27; citing Sands v. Crooke, 46 N. Y. 564; Morton v. Burn, 7 Ad. & El. 25; Storm v. U. States, 94 U. S. 83. That a contract may be by conduct, see § 86-7.

⁷ Swires v. Parsons, 5 W. & S. 557; Neil v. Gilmore, 79 Penn. St. 421.

such a sum in damages as they think he really merited. This is called *assumpsit* on a *quantum meruit*.—There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former, being only where one takes up goods or wares of a tradesman without expressly agreeing for the price. There the law concludes that both parties did intentionally agree that the real value of the goods shall be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.”¹ The same principle applies where one party pays money for another party at the latter’s request; repayment being thereby impliedly promised.² There must, however, be a contractual relation, express or implied, between the parties.³ Thus the employment of a husband on a farm does not involve an implied employment of his wife to do the housework.⁴ Generally, in all cases where goods or labor are ordered, a money indebtedness is implied to the party to whom the price is payable from the party who has had the benefit of the goods or labor.⁵ For this purpose the plaintiff is entitled to sue on an *indebitatus* count, as for a claim for money payable “for goods sold and delivered,” or “for goods bargained and sold,” or “for work and labor done;” “reserving the particular circumstances of the debt, if disputed, to be given in evidence.”⁶ “The principle on which

¹ 3 Black. Com. 162, adopted by Leake, 2d ed. 73; *Lampleigh v. Brathwait*, Hobart, 105; 1 Smith L. C. 7th Am. ed. 280; *Jewry v. Busk*, 5 Taunt. 302; *Allen v. Woodward*, 2 Fost. N. H. 544; *Downs v. Marsh*, 29 Conn. 409; *Comstock v. Smith*, 7 Johns. 87; *Oatfield v. Waring*, 14 Johns. 188.

² *Infra*, §§ 757 *et seq.*; *Brittain v. Lloyd*, 14 M. & W. 762; *Lewis v. Campbell*, 8 C. B. 541; *infra*, § 757. As to promises on executed considerations, see *supra*, § 514. As contract implied from acceptance of service or goods, see *supra*, § 7. As to partial failure of consideration, see *supra*, § 520; *infra*, §§ 745 *et seq.*; and see *Leach v. French*, 69 Me. 389.

³ *Infra*, §§ 784 *et seq.*

⁴ *Lyle v. Gray*, 47 Iowa, 153.

⁵ *Supra*, § 6; *Phillips v. Jones*, 1 A. & E. 333; *Goslin v. Hodson*, 24 Vt. 140; *James v. Bixby*, 11 Mass. 34; *Day v. Caton*, 119 Mass. 513; *Peter v. Steel*, 3 Yeates, 250; *Moreland v. Davidson*, 71 Penn. St. 371; *Dougherty v. Whitehead*, 31 Mo. 255.

⁶ Leake, 2d ed. 63; citing 2 Wms. Saun. 349 *b*; *Streeter v. Horlock*, 1 Bing. 34, 37; *Stone v. Rogers*, 2 M. & W. 443; see *Hastings v. Pepper*, 11 Pick. 41; *Badger v. Titcomb*, 15 Pick. 414; *Knight v. Worsted Co.*, 2 Cush. 286; *Maghee v. R. R.*, 45 N. Y. 514; *Humphreys v. Reed*, 6 Whart. 435.

the cases have been decided, as to the proper mode of declaring where the original contract has been executory, but the period of credit has expired or the condition has been performed, is not that the law alters the mode of declaring on the original contract, and states it not according to the fact, but that it conclusively infers that simple contract to pay the price for goods sold and delivered, which would arise upon the facts of a sale and delivery without any special circumstances accompanying them. He who seeks to disturb that inference must not content himself with merely showing conditions or other special provisions forming part of the contract at the time of its being entered into; he must show them in existence and operation at the time of the action brought; if not, they may be struck out of the consideration, and the contract treated as if originally simple, unconditional, and executed."¹ But mere reception of goods does not establish a liability to pay for them.²—What has been said applies with equal force to contracts for service.—As has been already seen,³ when work of a character for which it is the usual practice to pay as a matter of business, is done for a person who stands by and receives the benefit, then a proposal and acceptance will be inferred.⁴ "If the plaintiff's services were worthless, or were of no value, he

¹ Per cur. in *Beverley v. Lincoln*, 6 A. & E. 836; cited in *Leake*, 2d ed. 64. Mr. Leake, also, cites *Clark v. Bulmer*, 11 M. & W. 243, where the court said: "Whenever a simple contract is executed, and terminates in a debt which it is the duty of the defendant to pay *instantly*, it is no doubt the subject of an *indebitatus* count; but the executed contract must be described properly;" and see *Tripp v. Armitage*, 4 M. & W. 687; and for other cases, *supra*, § 6.

² *Supra*, § 22. "In *Boston Ice Co. v. Potter*, 123 Mass. 28, the court refused to hold the defendant to an implied promise to pay for ice which he had received and consumed during a year or more; and this upon the ground that a promise will not necessarily be implied from the mere fact of

receiving a benefit." Lord, J., *Earle v. Coburn*, 130 Mass. 597. As to rescinded sales, see *supra*, §§ 282 *et seq.*; *infra*, § 752.

³ *Supra*, § 7.

⁴ *Paynter v. Williams*, 1 C. & M. 810; *Lucas v. Godwin*, 3 Bing. N. C. 737; *Phillips v. Jones*, 1 A. & E. 333; *Smith v. Chance*, 2 B. & Ald. 755; *Pegge v. Lampeter Union*, L. R. 9 C. P. 373; *Abbot v. Hermon*, 7 Greenl. 121; *Derby v. Johnson*, 21 Vt. 17; *Farmington Academy v. Allen*, 14 Mass. 172; *Lowe v. Pimental*, 115 Mass. 44; *Day v. Caton*, 119 Mass. 513; *Clark v. Marsiglie*, 1 Denio, 317; *Hall v. Rupley*, 10 Barr, 231; *Stropes v. Board*, 72 Ind. 42; *Smith v. Morse*, 20 La. An. 220.

is not entitled to recover anything, but if they were of value, he is entitled to recover that value.”¹ But there must be a definite acceptance to bind; mere non-refusal does not suffice.² And to establish special remuneration, a special contract must be proved. Thus, from the mere fact of employing an attorney, a client cannot be held bound to pay such attorney a special retaining fee.³—Contracts of bailment stand on the same footing.—To sustain an action for use and occupation, “it is not necessary for the plaintiff to prove an express contract with the tenant when he took possession, or any particular reservation of rent, nor that the tenant has once paid rent, for an undertaking to that effect will be implied in all cases where a permissive holding is established.”⁴ “When the defendant has entered and occupied by permission of the

¹ *Cole v. Clarke*, 3 Wis. 323; *Jackson v. Cleveland*, 15 Wis. 108; *McCormick v. Ketchum*, 48 Wis. 646.

² *Supra*, § 22.

³ *McClellan v. Hayford*, Sup. Ct. Me. 1881. In this case, Burrows, J., said: “The jury must have understood from this that proof of the employment of the plaintiff as counsel would of itself, as matter of law, raise an implied promise on the part of the defendant to pay any reasonable sum which the plaintiff might charge as a retaining fee in all the contested cases, besides making compensation for all the services actually rendered; that something was due and recoverable as and for a retaining fee, in addition to the pay for services and disbursements in each contested case, and that the only question for them was, whether the sum charged was a reasonable sum to charge for a retainer. In support of the instructions, the plaintiff relies upon the cases of *Aldrich v. Brown*, 103 Mass. 527; *Perry v. Lord*, 111 ib. 504; *Pierce v. Parker*, 121 ib. 403; and *Eggleston v. Boardman*, 37 Mich. 14. But neither of these cases nor all of them combined can be regarded as

authority for the instruction here complained of. The circumstances under which a contract to pay a counsellor at law for services rendered and expenses incurred may be inferred, and the character and effect of the contract, do not essentially differ from those which pertain to and regulate contracts for other professional services, skilled labor of any kind, and, in fact, any kind of service in which the amount of the compensation necessarily depends largely upon the circumstances under which the service is rendered, its nature, and the charges that are usual and customary for like services. Hence, in the absence of a special contract to pay these retainers, the plaintiff must prove enough to show that there was an implied promise on the part of the defendant to pay them.”

As will be hereafter seen, there can be no recovery for services rendered as a matter of courtesy or of family service. *Infra*, § 719.

⁴ *Taylor, Land. and Ten.* § 655, adopted by *Wallace, J.*, *Cobb v. Kidd*, 12 Rep. 769.

plaintiff without any express contract, the law implies a promise on his part to make compensation, or pay a reasonable rent for his occupation."¹—A contract, however, as we have just seen, will not be implied when there is an express contract covering the same subject matter between the parties. Nor will a contract be implied when the alleged promisee has entered into contractual relations with a third party for payment.—“If A. contract with B. to furnish board at his expense to fifty men in his employ, and B. furnishes it, there is no implied contract on the part of the boarders to pay each for his own board. And this, not because they are employed by A., but because the board was furnished on A.’s promise to pay for it.”²

§ 709. When there is an established course of business between two parties, then services rendered by one to the other may be regarded as made subject to the general engagement previously instituted.³ Thus, a specific proposal and acceptance will be inferred where an agent makes disbursements incidental to the due discharge of his agency, though not distinctively requested.⁴—A proposal and acceptance, also, may be implied from usage, supposing that the parties place themselves within the operation of such usage.⁵ Thus, the particular kind of credit given by a shipwright for the repairs of a ship will be determined by the local usage to which the parties subjected themselves.⁶ And the limit of the contract of brokerage is thus determined,⁷ and so of other mercantile agencies.⁸ But

Proposal and acceptance implied from course of business and usage.

¹ Strong, J., *Carpenter v. U. S.*, 17 Wal. 489.

² Soule, J., *Mass. Gen. Hosp. v. Fairbanks*, 129 Mass. 81.

³ *Supra*, § 653; Ch. on Con. 11th Am. ed. 81 *et seq.*; *Rogers v. Price*, 3 Y. & J. 28; *Wiltshire v. Sims*, 1 Camp. 258; *Bruce v. Hunter*, 3 Camp. 467; *Eaton v. Bell*, 5 B. & Ald. 34; *Calton v. Bragg*, 15 East, 223.

⁴ Wh. on Ag. § 311; *Bayley v. Wilkins*, 7 C. B. 886; *Smith v. Lindo*, 5 C. B. N. S. 587; *Colley v. Merrill*, 6 Greenl. 50; *Stocking v. Sage*, 1 Conn.

519; *Powell v. Newburgh*, 19 Johns. R. 284; *Wynkoop v. Seal*, 64 Penn.

St. 361.

⁵ See Wh. on Ev. §§ 962 *et seq.*; *supra*, §§ 6, 7.

⁶ *Raitt v. Mitchell*, 4 Camp. 146.

⁷ Wh. on Ag. §§ 134, 696; Wh. on Ev. § 968; *Sutton v. Tatham*, 10 A. & E. 27; *Farnsworth v. Hemmer*, 1 Allen, 494.

⁸ *Young v. Cole*, 3 Bing. N. C. 724; *Graves v. Legg*, 2 H. & N. 210; *Schuchardt v. Allen*, 1 Wall. 359; *Randall v. Kehler*, 60 Me. 37; *Day v. Holmes*,

a usage, to be thus recognized, must be reasonable and consistent with the policy of the law.¹ Nor can it be introduced to establish a contract when there is no contractual relation. Its object is to elucidate what exists, not to create that which previously had no existence.² Thus, in a case in Maryland in 1880, it was held that an executor could not be made liable, on the ground of usage, for provisions furnished to persons attending the deceased's funeral.³

§ 710. Under this head may be ranked contracts of guaranty and indemnity. "If you will employ A., I will guarantee his good conduct," or "I will indemnify you for any loss," or "if you will sell A. certain goods, I will answer for his paying." In each of these cases there is a conditional proposal which is

Proposal to
guaranty
involves
promise to
pay.

103 Mass. 306; Wh. on Ev. § 967; Smith v. Tracy, 36 N. Y. 79; Baker v. Drake, 66 N. Y. 518; Benners v. Clemens, 58 Penn. St. 24; Frank v. Jenkins, 22 Oh. St. 597.

¹ Farnsworth v. Hemmer, 1 Allen, 494; Snelling v. Hall, 107 Mass. 138; Evans v. Waln, 71 Penn. St. 69.

² Wh. on Ev. §§ 965 *et seq.*, and cases there cited.

³ "On the day of the funeral," so runs the opinion of the court, "the body was taken to a church some five miles distant for interment, and after the funeral services were over and the body buried, the plaintiff (with whom the deceased had lived and at whose house he died) caused an invitation to be given to those present to repair to his house for dinner; and the proof shows that some seventy or eighty persons accepted the invitation and dined with the plaintiff, and that twenty-five or thirty horses, of parties so dining, were also fed by the plaintiff. It nowhere appears that this entertainment was provided at the instance or request of the defendant; but it seems to have been the unsolicited and voluntary act of the plaintiff. The charge is sought

to be maintained by what is said to be a custom in the neighborhood. If custom could enter into the matter, and shape the claim of the plaintiff, that custom, if allowed to be uniform in operation, would, to a large extent, control the discretion of the orphans' court, without respect to the condition and circumstances of the deceased. If custom could authorize the giving of funeral dinners at the expense of the estate of the deceased, the allowance therefor would be proper, whether the estate proved to be solvent or insolvent, or whether the number of persons attending them be eighty or five hundred, or even more. Such entertainments are not the ordinary, and certainly not the necessary, incidents of funerals, nor are they within the contemplation of the law which provides for the allowance of reasonable funeral expenses, having reference to the condition and circumstances of the deceased. Those who think proper to furnish such entertainments must do so from motives of hospitality, and not with design of charging the estate of the deceased." *Shaeffer v. Shaeffer*, 54 Md. 679.

accepted when A. is employed, or when the goods are delivered to A.¹ Until this acceptance, and notice thereof when this is required, the contract is not complete, and has no binding effect.² A proposal to a creditor to forbear may take this conditional type. "If you will not press your claim, I will save you harmless." The forbearance, with notice to the party making the proposal, establishes the contract between him and the creditor forbearing, and a term of the contract is the promise to pay.³

§ 711. If a contract of sale is inoperative under the statute of frauds, but the consideration has been received, the party receiving can be sued on a *quantum meruit*. The vendee has received the goods, and a proposal and acceptance will be implied. And the same rule applies to other contracts void under the statute of frauds, where an express contract is void because it was not engrossed in a way the statute of frauds prescribes.⁴ A similar distinction is applicable to an infant's contracts for labor,⁵ and to champertous contracts.⁶ It has also been held that where a contract for labor is defective from having been made on Sunday, the employee can recover on a *quantum meruit*.⁷

Implied promise may be raised when express contract is bad under statute of frauds or otherwise.

§ 712. We have already seen⁸ that, when payment of goods is conditioned on delivery, delivery is a condition precedent; and that delivery of successive instal-

When after partial delivery, final

¹ *Kennaway v. Treleavan*, 5 M. & W. 501. When guarantors and indemnifiers are entitled to notice of acceptance, see *supra*, § 570.

² *Supra*, § 17; *Offord v. Davies*, 12 C. B. N. S. 748; *Westhead v. Sproson*, 6 H. & N. 728; see *Phillips v. Foxall*, L. R. 7 Q. B. 666.

³ *Supra*, §§ 532, 570 *et seq.*; *Morton v. Burn*, 7 A. & E. 19; *Wilby v. Elgee*, L. R. 10 C. P. 497; see *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Burgess v. Eve*, L. R. 13 Eq. 450; *Chapin v. Lapham*, 20 Pick. 467; *Gibson v. Rennie*, 19 Wend. 389; *Ward v. Fryer*, 19 Wend. 494; *Parmelee v. Thompson*, 45 N. Y. 58.

⁴ *Mavor v. Pyne*, 3 Bing. 285; *Morton v. Tibbett*, 15 Q. B. 434; *Bayley v. Rimmel*, 1 M. & W. 506; *Richards v. Allen*, 17 Me. 296; *Lane v. Shackford*, 5 N. H. 133; *King v. Welcome*, 5 Gray, 41; *Comes v. Lamson*, 16 Conn. 246 (though see *Clark v. Terry*, 25 Conn. 395); *Allen v. Booker*, 2 Stew. 21; *Beaman v. Buck*, 9 Sm. & M. 207; and other cases cited in 1 Ch. on Cont. 11th Am. ed. 81; and criticism in 2 Ch. on Cont. *ut supra*, 852.

⁵ *Supra*, §§ 42, 51.

⁶ *Supra*, § 427.

⁷ *Supra*, § 382; *Thomas v. Hatch*, 53 Wis. 296.

⁸ *Supra*, §§ 579, 603.

delivery of
goods is
prevented,
vendor
may sue on
indebitatus
count.

ments may be conditioned on discharge of duty as to the first.¹ It is now to be observed that when a contract has been in part performed, but the completion of the performance has been prevented by the action of one of the parties, then the other party may waive the contract as originally settled, and sue on an *indebitatus* count for simply the consideration actually received by the other party.² On a contract, for instance, to sell a thousand tons of coal, if the purchaser prevent the delivery of one-half, but receive the other half, the vendor may maintain at once against the vendee a suit for goods sold and delivered so far as concerns the half received, though by the terms of the contract the sale was to be on a credit as yet unexpired.³ The vendor, in other words, may treat the contract as rescinded, and sue the purchaser as on a new contract for that part of the consideration which has been received, as on a specific assumption of indebtedness. Hence, where a lot of goods were sold on credit on successive deliveries, and after a partial delivery the purchaser refused to receive the remaining instalments, it was held that the vendor might elect to rescind the contract, and sue at once for the goods which had been delivered.⁴ The same principle applies, as we will presently see, to cases where an employee is prevented from com-

¹ *Supra*, § 580.

² *Infra*, § 899; *supra*, §§ 290, 302; Leake, 2d ed. 65; Benj. on Sales, § 690; Mavor v. Pyne, 3 Bing. 285; Planche v. Colburn, 8 Bing. 14; Inchbald v. Tea Co., 17 C. B. N. S. 733; Burton v. Pinkerton, L. R. 2 Ex. 340; Williams v. Bank, 2 Pet. 102; Webb v. Stone, 24 N. H. 288; Derby v. Johnson, 21 Vt. 17; Webster v. Coffin, 14 Mass. 196; Moulton v. Trask, 9 Met. 577; Miner v. Bradley, 22 Pick. 457; Star Glass Co. v. Morey, 108 Mass. 570; Miller v. Ward, 2 Conn. 494; Wright v. Barnes, 14 Conn. 518; Dubois v. Canal Co., 4 Wend. 285; Hall v. Rupley, 10 Barr, 231; Sinnott v. Mullin, 82 Penn. St. 333; Jones v.

Mial, 82 N. C. 252; Gorman v. Bellamy, 82 N. C. 496; McMillan v. Malley, 10 Neb. 228. For authorities in Roman law, see *supra*, § 603. That the performance of a condition precedent may be waived, see *supra*, § 604.

³ *Supra*, § 579. As to divisibility, see *supra*, §§ 233, 338, 511; *infra*, §§ 897, 899, 901; Booth v. Tyson, 15 Vt. 515; Updike v. Ten Broeck, 3 Vroom, 105; Shaw v. Badger, 12 S. & R. 275.

⁴ Bartholomew v. Markwick, 15 C. B. N. S. 711. See generally to the same effect, Wilkins v. Stevens, 8 Vt. 214; McKnight v. Devlin, 52 N. Y. 399; Barnwell v. Kempton, 22 Kan. 314.

pleting his work by a wrongful dismissal by the employer;¹ and to all cases where the party to be benefited releases the other party from performance.² On the other hand, a party who undertakes to deliver to another a particular lot of goods, and who abandons the undertaking before completion, subjects himself to having the whole contract rescinded, and the goods, as far as delivered, thrown back on his hands. If, however, the purchaser holds on to the goods, this may be regarded as starting a new contractual relation between them, making the purchaser liable to the vendor in *indebitatus assumpsit* for the goods actually received.³ Whatever is retained must be paid for, whether the goods retained be in compliance with contract or in excess of contract.⁴

§ 713. It is within the power of the parties to make payment of an employee contingent on completion of work; and if so there can be no claim for payment until the work is complete, although he may claim for damages sustained by a wrongful dismissal.⁵ It must appear, however, from the contract, or from the course of business, that it was intended that, unless the work be completed, there shall be no compensation.⁶ This is usually the case with regard to contracts with real estate agents to buy, sell, or lease, in which case no commissions are due unless the mandate is completed;⁷ and so with regard to other contracts of brokerage.⁸ But if, after a broker has obtained a customer on the employer's terms, the transaction is wantonly broken off by the employer, the broker is entitled

Otherwise when there is to be no payment except for aggregate.

¹ *Infra*, § 716, and see *supra*, §§ 406; *Witherow v. Witherow*, 16 Ohio, 606-7.

² *Supra*, § 602.

³ *Supra*, §§ 520, 601 *et seq.*; *Leake*, 2d ed. 68; *Champion v. Short*, 1 Camp. 53; *Shipton v. Casson*, 5 B. & C. 378; *Oxendale v. Wetherill*, 9 B. & C. 386; *Star Glass Co. v. Morey*, 108 Mass. 570; see *Symonds v. Carr*, 1 Camp. 361; *Roberts v. Beatty*, 2 Pen. & W. 63. As dissenting from *Oxendale v. Wetherill*, see *Champlin v. Rowley*, 18 Wend. 187; *Paige v. Ott*, 5 Denio, 406; *Witherow v. Witherow*, 16 Ohio, 238.

⁴ *Hart v. Miles*, 15 M. & W. 85; see *Downer v. Thompson*, 6 Hill, N. Y. 208; *Clark v. Gaylord*, 24 Conn. 484; *Rutgers v. Lucet*, 2 Johns. Cas. 92; *Harlan v. Harlan*, 20 Penn. St. 303. As to distinctive New York rule, see *infra*, § 899.

⁵ *Infra*, § 900, and cases there cited.

⁶ *Cutter v. Powell*, 6 T. R. 320.

⁷ *Bull v. Price*, 7 Bing. 237.

⁸ *Read v. Rann*, 10 B. & C. 438; see *Hamond v. Holiday*, 1 C. & P. 384.

to remuneration *pro tanto*.¹—When there is an agreement, express or implied, for a lumping payment or commission at the end of the service, a party rescinding, supposing him to be entitled to compensation, is restricted to a suit on the *quantum meruit*. But he cannot rescind, and yet claim for damages under the contract.²

§ 714. When the agreement is to do a particular work by the job (*locatio operis*) for a lumping price, and the completion of the work is prevented by *casus*, then usually *indebitatus assumpsit* cannot be maintained for the amount of work actually performed.³ When a tailor, for instance, dies before completing a coat he undertook to make, his representatives cannot sue for the time he spent on it;⁴ when a party orders a set of artificial teeth, but dies before completion, the dentist has no claim against his executors for the partial work done;⁵ and when certain machinery, which is to be paid for as a whole, is destroyed by fire before completion, there can be no recovery for the part of the work done before the fire.⁶ “The plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant’s fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.”⁷ It is otherwise, however, when from the contract it appears that the work was to be paid *pro tanto* as it proceeded.⁸ And where

¹ Leake, 2d ed. 67; *Prickett v. Badger*, 1 C. B. N. S. 296.

² *Supra*, § 603.

³ *Supra*, §§ 308, 322 *et seq.*; *Adlard v. Booth*, 7 C. & P. 108; see *Gillett v. Mawman*, 1 Taunt. 140; *Wadsworth v. Alcott*, 2 Seld. 64; *Martin v. Schoenberger*, 8 W. & S. 367; *King v. Humphreys*, 10 Barr. 217; *Steeple v. Newton*, 7 Oregon, 110.

⁴ *Werner v. Humphreys*, 2 M. & G. 853; see *Lee v. Griffin*, 1 B. & S. 272; *Leake*, 2d ed. 68, 70.

⁵ *Lee v. Griffin*, 1 B. & S. 272; see *Clay v. Yates*, 1 H. & N. 730; *Campa-*

nari v. Woodburn, 15 C. B. 400; see discussion of this case in *Benj. on Sales*, 3d Am. ed. § 102; and see *Prescott v. Locke*, 51 N. H. 96.

⁶ *Appleby v. Myers*, L. R. 2 C. P. 651; *supra*, § 322; see *Morrison v. Cummings*, 26 Vt. 486; *McClurg v. Price*, 59 Penn. St. 420.

⁷ *Appleby v. Myers*, *ut supra*.

⁸ *Leake*, 2d ed. 70; *supra*, §§ 286 *et seq.*; *Menetone v. Athewes*, 3 Burr. 1592; *Cook v. McCabe*, 53 Wis. 250; cited *supra*, § 326; see *McMellan v. Melloy*, 10 Neb. 228, where it was held that on a contract to thresh an entire

the premises on which the work was to be done were burned after an instalment was performed and before it was paid for, the work being divisible in instalments, it was held that the employee could recover for the instalment finished.¹ Hence, whenever the object on which labor is to be spent is destroyed by *casus* before the labor is complete, then if the contract is divisible there can be a recovery for the work actually done;² and an employee who is prevented by *casus* from serving out his full term of employment, may nevertheless recover for the services actually rendered on a *quantum meruit*.³ When, also, a contract for work and labor at wages has been terminated by any means other than the voluntary refusal of the employee to perform the work on his part, and the employer has received benefit from the labor performed or material furnished by the employee, "the value of such labor and materials may be recovered on a count upon a *quantum meruit*, in which case the actual benefit which the defendant receives from the plaintiff is to be paid for, independently of the terms of the contract."⁴ "We have abundant reason to believe that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contract must be presumed to be made with reference to that understanding, unless an express

crop of wheat at a given price per acre, the employee, failing fully to perform, may recover at the contract price for what he has done, less the damages sustained by the employer by the breach of the contract.

¹ *Schwartz v. Saunders*, 46 Ill. 18; see *supra*, § 322.

² *Supra*, § 326.

³ 2 Ch. on Cont. 11th Am. ed. 849; citing *Dickey v. Linscott*, 20 Me. 453; *Lakeman v. Pollard*, 43 Me. 463; *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Brown*, 11 Met. 440; *Ryan v. Dayton*, 25 Conn. 188; *Fahy v. North*, 19 Barb. 341. In *Dewey v. School Dist.*, 43 Mich. 480, it was held that a teacher employed in a public school might re-

cover for his salary for a period during which the school was suspended on account of smallpox having attacked some of the scholars. See, on this topic, a learned note in 38 Am. Rep. 206, as reproduced in part in 25 Alb. L. J. 384; and see distinction as to *casus* taken, *supra*, §§ 308, 311, 322. The rule where completion of the job is prevented by the employer's interference is discussed *infra*, § 716.

⁴ Lord, J., *Fitzgerald v. Allen*, 128 Mass. 234; citing *Hayward v. Leonard*, 7 Pick. 181; *Smith v. Meeting House*, 8 Pick. 178; *Moulton v. Trask*, 9 Met. 577; *Snow v. Ware*, 13 Met. 42; *Atkins v. Barnstable*, 97 Mass. 428.

stipulation shows the contrary." . . "Where a beneficial service has been performed and received, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect."¹

§ 715. A contract of common carriage is dependent upon the delivery of the goods at a designated place; and if by *casus* such delivery is prevented, the carrier cannot recover *pro tanto* for freight for the part of the route over which the goods were taken.² It is otherwise, however, in cases where the owner resumes possession of the goods at an intermediate point, accepting delivery at that point in lieu of delivery at the point of destination.³

Contracts of common carriage dependent on completion.

When service is broken into by employer, back wages may be recovered on *quantum meruit* or for damages.

§ 716. A party who is employed at fixed wages, and who is wrongfully dismissed during his term of service, or whose term of service is otherwise closed by the employer's action, is entitled, if he elect to rescind the contract, to recover on a *quantum meruit* for the work done;⁴ or he may recover damages independently for the breach of contract, electing to consider it still in operation, and binding the employer.⁵ Hence, when there has been a contract for service, even on a salary not due until the close of a year, and the employer

¹ Britton v. Turner, 6 N. H. 481; adopted in Fenton v. Clark, 11 Vt. 560; Duncan v. Baker, 21 Kan. 99; Parcell v. McComber, 11 Neb. 211. But see Olmstead v. Beale, 19 Pick. 529; *infra*, § 718.

² Leake, 2d ed. 70; Cook v. Jennings, 7 T. R. 381; Metcalfe v. Ironworks Co., L. R. 1 Q. B. D. 613; L. R. 2 Q. B. D. 423; Caze v. Ins. Co., 7 Cranch, 358; Columbia Ins. Co. v. Catlett, 12 Wheat. 383. This applies where a ship is brought in by salvors, The Kathleen, L. R. 4 Adm. 269; and where the master is obliged to sell part of the cargo at an intermedi-

ate port for the refitting of the ship. Hopper v. Burness, L. R. 1 C. P. D. 137.

³ Ibid.; The Soblomsten, L. R. 1 Adm. 293.

⁴ *Supra*, §§ 605, 714; Planche v. Colburn, 8 Bing. 14; Chicago v. Tilley, 103 U. S. 146; Alexander v. Hoffman, 5 W. & S. 382; Campbell v. Gates, 10 Barr, 483; Mitchell v. Scott, 41 Mich. 108; see Weber v. Ins. Co., 5 Mo. Ap. 51; Du Quoin Co. v. Thorwell, 3 Ill. Ap. 394.

⁵ Goodman v. Pocock, 15 Q. B. 576; Cox v. McLaughlin, 54 Cal. 606; see *supra*, § 605.

chooses to dismiss without cause the employee at the end of a quarter, the employee can maintain at once an action for his services on a *quantum meruit*, or he may sue for damages caused to him by the wrongful dismissal, as a part of which damages his salary *pro tanto* may be included.¹ Even when there is an employment to do a specific work (*locatio operis*), e. g., painting a picture, and the employer stops the work before completion, the employee may recover on a *quantum meruit*.² If the suit be for damages, they may be reduced by showing that the servant refused other suitable employment, and remained idle when he might have received wages.³ When the contract is to complete a specific piece of work, the employer, by preventing the completion of the work, may make himself liable for a breach of contract.⁴ As a rule a party who disables himself from performing his part of a contract, cannot set up as a defence a technical default in the other party.⁵—When a contract is determined by mutual consent, the employee may recover wages *pro rata*,⁶ and so when the term is broken into by the employer's death.⁷

§ 717. If, however, when his wages are still running, an employee abandon his post, he exposes himself to a suit by his employer for damages if such are incurred by his abandonment. If any

But not when completion is prevented by employee.

¹ *Supra*, §§ 605–6; *Goodman v. Pocock*, 15 Q. B. 576; *Canada v. Canada*, 6 Cush. 15; see *Derby v. Johnson*, 21 Vt. 18; *Myers v. Baptist Soc.*, 38 Vt. 614; *Moulton v. Trask*, 9 Met. 577; *Costigan v. R. R.*, 2 Denio, 612; *Hall v. Rupley*, 10 Barr, 231; *Stewart v. Walker*, 14 Penn. St. 293.

² *Leake*, 2d ed. 66; see *supra*, § 714.

³ See *Cutter v. Powell*, 6 T. R. 320; *Elderton v. Enmens*, 4 C. B. 498, 4 H. L. C. 624; *Caden v. Farwell*, 98 Mass. 137.

⁴ *Supra*, § 605.

⁵ *Supra*, §§ 325, 606; *infra*, §§ 747–901. That when there is a hiring for a term and a wrongful dismissal before the close of the term, the employee can

recover for the whole term, see, in addition to the cases given above, *Miller v. Goddard*, 34 Me. 102; *Fowler v. Armour*, 24 Ala. 194; *Pond v. Wyman*, 15 Mo. 175; *Dunn v. Hereford*, 1 Wy. Ter. 206. But a servant dismissed before the expiration of a term contracted for cannot maintain an action to recover wages occurring subsequently to the dismissal. His remedy is a suit for damages. *Weed v. Burt*, 78 N. Y. 191; *White v. Gray*, 4 Ill. Ap. 228; see *Hamill v. Fonte*, 51 Md. 419; *Alexander v. Americus*, 61 Ga. 36.

⁶ *Lamburn v. Cruden*, 2 M. & G. 253; *Thomas v. Williams*, 1 A. & E. 685; *Rogers v. Steele*, 24 Vt. 513.

⁷ *Dryer v. Lewis*, 57 Ala. 551.

portion of his wages be overdue by the occurrence of a period of payment before his giving up his position, such amount, if there be no set-off, may be recovered by him. But he cannot recover for the fraction of a term he wrongfully broke into, *e. g.*, if he leave in the middle of a quarter, his wages being payable quarterly.¹ If, in other words, the servant leave wantonly before the expiration of his term of service, and the service contract is for an entirety, then he forfeits his right to wages for the whole term.² "Where there is an executory contract, and the plaintiff has performed part of it, and wilfully and without legal excuse refuses to perform the rest of it, he cannot recover either in general or special assumpsit."³ "It is the settled law of this state, that when one party contracts to labor for another for a specified term, and leaves the service of the employer before the expiration of such term without any cause proceeding from the employer or 'the act of God,' he cannot maintain an action for the value of the services he has rendered."⁴ The same distinctions are applicable when he is rightfully dismissed for misconduct.⁵—Mere harsh language by the employer will not justify the employee in giving up his place.⁶ But the closing of his term of service,

¹ *Supra*, §§ 325, 596; Leake, 2d ed. 71, citing *Taylor v. Laird*, 1 H. & N. 266; see *Atkin v. Acton*, 4 C. & P. 208; *Powers v. Wilson*, 47 Iowa, 666.

² *Davis v. Maxwell*, 12 Met. 286; *Reab v. Moore*, 19 Johns. 337; *Eldridge v. Rowe*, 2 Gilm. 91.

³ *Robinson, J.*, in *Gill v. Vogler*, 52 Md. 666, citing *Faxan v. Mansfield*, 2 Mass. 147; *Stark v. Parker*, 2 Pick. 267; *Cutler v. Powell*, 2 Smith, Lead. Cas. 1.

⁴ *Hough, J.*, *Rowland v. R. R.*, 73 Mo. 619.

⁵ See *supra*, § 595-6; and see, further, *Turner v. Robinson*, 5 B. & Ad. 789; *Spain v. Arnott*, 2 Starke, 227; *Ridgway v. Market Co.*, 3 Ad. & El. 171; *Atkin v. Acton*, 4 C. & P. 208; *Nichols v. Coolahan*, 10 Met. 449; *Thayer v. Wadsworth*, 19 Pick. 349; *Libhart v.*

Wood, 1 W. & S. 265; *Stewart v. Walker*, 14 Penn. St. 293; *Byrd v. Boyd*, 4 McCord, 246; see *Monell v. Burns*, 4 Denio, 121; *Lynch v. Stone*, 4 Denio, 356; *Schuerer v. Lamp*, 19 Mo. 40; *Southmayd v. Ins. Co.*, 47 Wis. 517.

In some states, however, an employee, even after a rightful dismissal, may recover on a *quantum meruit* for services actually rendered. *Lawrence v. Gullifer*, 38 Me. 532; *Champion v. Harts-horn*, 9 Conn. 574, and cases cited 2 Ch. on Con. 11th Am. ed. 849; as for what is a rightful dismissal see *infra*, § 718. In such cases damages through the employee's breach of contract are to be deducted. *McMillan v. Malloy*, 10 Neb. 228. That wilful disobedience will justify a dismissal see *infra*, § 718.

⁶ *Forsyth v. Hastings*, 25 Vt. 646.

whether by unjustifiable abandonment on his part, or just dismissal by his employer, precludes him from recovery for the term thus left incomplete.¹ It has been argued, however, with great force, that a party who has done his work faithfully through a large fraction of a term, should not be precluded from recovering for such fraction because he has thrown up his employment before the term is complete, no damage being done to the employer.² And, as we have seen, when a payment is overdue, though the money has not been received, the employee is entitled to recover it, though during the next term he wrongfully abandons his post, or is rightfully dismissed, if there be no set-off.³

§ 718. In England an engagement for domestic service is inferred, unless local or special custom be to the contrary, to be for a year, with a right of determination on a month's warning, or by payment of a month's wages.⁴ This rule has been applied to a head gardener,⁵ and to a huntsman,⁶ but does not apply to clerks,⁷ or governesses.⁸ In this country no such implication exists,⁹ and even in England the rule is subordinate to local or special usage.¹⁰ And the fact that wages are payable at fixed intervals short of a year rebuts the inference of yearly hiring.¹¹ When the hiring is for a particular season, it expires by its own limitation at the closing of the

Term of domestic service dependent on circumstances.

¹ See cases cited *supra*, to this section; *Cutter v. Powel*, 6 T. R. 320; and notes in *Smith's L. C.* 7th Am. ed.; *Huttmann v. Boulnois*, 2 C. & P. 510; *Miller v. Goddard*, 34 Me. 102; *Philbrook v. Belknap*, 6 Vt. 383; *Mack v. Bragg*, 30 Vt. 571; *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 Pick. 528; *Rice v. Dwight Man. Co.*, 2 Cush. 80.

² *Britton v. Turner*, 6 N. H. 481; *Laton v. King*, 19 N. H. 280; *Davis v. Barrington*, 30 N. H. 529; and see *Fenton v. Clark*, 11 Vt. 560, and cases *supra*, § 714.

³ *Taylor v. Laird*, 1 H. & N. 266; *Button v. Thompson*, L. R. 4 C. P. 330; *White v. Atkins*, 8 Cush. 367.

⁴ 2 Ch. on Cont. 11th Am. ed. 839; *Turner v. Mason*, 14 M. & W. 112; *Lilley v. Elwin*, 11 Q. B. 742.

⁵ *Nowlan v. Ablett*, 2 Cr. M. & R. 54.

⁶ *Nicoll v. Greaves*, 17 C. B. N. S. 27.

⁷ *Fairman v. Oakford*, 5 H. & N. 635. See *Buckingham v. Canal Co.*, 46 L. T. N. S. 885.

⁸ *Todd v. Kerrich*, 8 Exch. 151.

⁹ 2 Ch. on Cont. 11th Am. ed. 839.

¹⁰ *Metzner v. Bolton*, 9 Exch. 518; *Parker v. Ibbetson*, 4 C. B. N. S. 346; *Blaisdell v. Lewis*, 32 Me. 515. See *Reab v. Moore*, 19 Johns. 337; *Kirk v. Hartman*, 63 Penn. St. 97; *Wilmington Coal Co. v. Lamb*, 90 Ill. 465.

¹¹ *Baxter v. Nurse*, 6 M. & G. 935.

season.¹ But where the hiring is merely at will, without limit assigned, or without fixed periods of payment of wages, a person so employed may be discharged without notice.²—Hiring by weekly wages, there being no other limitation of time in the contract, is regarded as hiring by the week; hiring by monthly wages as hiring by the month.³—Special regulations adopted by employers will be held binding, if reasonable, on employees, if they have notice of them.⁴—An employee may be dismissed without warning if he wilfully disobey any lawful order of the employer;⁵ or if he be incapable of doing the work he undertook to do;⁶ or if he be guilty of any offence against decency or morality.⁷

§ 719. Where services are rendered as a matter of family or friendly attention, a promise to pay will not be inferred. There is in such cases no proposal to serve for money, and hence there can be no acceptance;⁸

Special
promise to
pay not to
be implied

¹ Leake, 2d ed. 273; *Beeston v. Collyer*, 4 Bing. 309; *Brown v. Symonds*, 8 C. B. N. S. 208; *Langton v. Carleton*, L. R. 9 Ex. 57.

² *Kirk v. Hartman*, 63 Penn. St. 97. —Where the agreement was that P. should work for D. for “seven months at \$12 per month,” it was held that this was an entire contract, and that \$84 were to be paid at the end of the seven months, and not \$12 at the end of each month, and that if P. left without cause before the seven months expired, he was entitled to recover nothing for his services. *Davis v. Maxwell*, 12 Met. 286, citing *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 Pick. 528; *Thayer v. Wadsworth*, 19 Pick. 349; *Nichols v. Coolahan*, 10 Met. 449. But see *contra*, § 714.

³ *R. v. Hampreston*, 5 T. R. 205; *Bayley v. Rimmell*, 1 M. & W. 507.

⁴ *Harman v. Salmon Falls Co.*, 35 Me. 447; *Hunt v. Otis Co.*, 4 Met. 464; see *supra*, § 24. It was ruled in *Bast v. Byrne*, 51 Wis. 531, that a master who keeps a servant in his employ through

a fixed term of service, cannot deduct from the servant's wages for lost time, nor compel him to make up the lost time. The master may discharge the servant for an unauthorized absence, but by receiving the servant back after absence he waives the right. That death of either party works a dissolution, see *supra*, §§ 312, 325; *Farrow v. Wilson*, L. R. 4 C. P. 744.

⁵ 2 Ch. on Cont. 11th Am. ed. 843; *Turner v. Mason*, 14 M. & W. 112; *Amor v. Fearon*, 9 A. & E. 548; *Lilley v. Elwin*, 11 Q. B. 742; *Lomax v. Ardington*, 10 Exch. 734. As to dismissal see *supra*, § 717.

⁶ *Harmer v. Cornelius*, 5 C. B. N. S. 236.

⁷ *Atkin v. Acton*, 4 C. & P. 408; *Singer v. McCormick*, 4 W. & S. 265; *Byrd v. Boyd*, 4 McC. 246; *Jones v. Jones*, 2 Swan, 605; *McCormick v. Demary*, 10 Neb. 515.

⁸ 2 Ch. on Cont. 11th Am. ed. 838; *Munger v. Munger*, 33 N. H. 581; *Bundy v. Hyde*, 50 N. H. 122; *Davis v. Goodnow*, 27 Vt. 715; *Robinson v.*

nor when they are at the time regarded on both sides as a courtesy.¹ When services are rendered *prima facie* as a matter of family duty or courtesy, it is necessary, if compensation is sought for them, to prove a distinct arrangement between the parties by which payment is to be made;² the question, however, being dependent upon the relations and circumstances of the parties.³ And this is held to be the case with regard not merely to blood relations, but to relations by marriage,⁴ though this does not apply where a son-in-law, in poor circumstances, takes his mother-in-law as an inmate of his family with an understanding that he should be paid for her board;⁵ nor to a son-in-law who materially assists a father-in-law;⁶ nor to a niece by marriage who does work for her uncle by marriage.⁷ The rule, also, does not apply to services which

in cases of friendly or family service, nor where there is no recognition of business relationship.

Cushman, 2 Denio, 152; Wilcox v. Denio, 152; Ridgeway v. English, 2 Wilcox, 48 Barb. 329; Ridgeway v. English, 2 Zab. 409; Zerbe v. Miller, 16 Penn. St. 488; Hertzog v. Hertzog, 29 Penn. St. 465; Duffey v. Duffey, 44 Penn. St. 399; Amey's App., 49 Penn. St. 126; Butler v. Slamm, 50 Penn. St. 456; Medsker v. Richardson, 72 Ind. 323; Brown v. Yaryan, 74 Ind. 305; Guenther v. Birkicht, 22 Mo. 439; Spiegelberg v. Mink, 1 New Mex. 308; in Andrus v. Foster, 17 Vt. 556; Ridgeway v. English, 2 Zab. 409; and Smith v. Smith, 30 N. J. Eq. 564, it was held that a daughter who continued to serve in her father's family after coming of age could not, without proof of a special contract, recover from the father's estate; and so of a son, Bundy v. Hyde, 50 N. H. 122; Mosteller's App., 30 Penn. St. 473; and of a son-in-law, Lovet v. Price, Wright, Ohio, 89.

¹ Ball v. Newton, 7 Cush. 599; Robinson v. Raynor, 28 N. Y. 494; Candor's App., 5 W. & S. 515.

² Munger v. Munger, 33 N. H. 581; Fitch v. Peckham, 16 Vt. 150; Davis v. Goodnow, 27 Vt. 715; Guild v. Guild, 15 Pick. 130; Robinson v. Cushman, 2

Denio, 152; Ridgeway v. English, 2 Zab. 409; Candor's App., 5 W. & S. 513; Steel v. Steel, 12 Penn. St. 64; Leidig v. Coover, 47 Penn. St. 534; Miller v. Miller, 16 Ill. 296; Taylor v. Lincumfelter, 1 Lea (Tenn.), 83; Osier v. Hobbs, 33 Ark. 216. "The law holds that as between near relatives a contract for service must be clearly established, and will not be implied." Opinion of Neale, P. J., adopted by supreme court in Overseers of Plum Creek v. Overseers, 1 Penn. Sup. Ct. 408.

³ Harshberger v. Alger, 31 Grat. 52; O'Connor v. Beckwith, 41 Mich. 657.

⁴ 2 Ch. on Cont. 11th Am. ed. 838; Sharp v. Cropsey, 11 Barb. 224; De-
trance v. Austin, 9 Barr. 309; Lantz v. Frey, 14 Penn. St. 201; Butler v. Slamm, 50 Penn. St. 456.

⁵ Wence v. Wykoff, 52 Iowa, 644.

⁶ Amey's App., 49 Penn. St. 126; Shoch v. Garrett, 69 Penn. St. 144.

⁷ Gardner v. Hefley, 49 Penn. St. 163. That there may be inferred from circumstances a special contract by a father to pay for the services of a minor son, see Titman v. Titman, 64 Penn.

are rendered with the understanding that they are to be rewarded, at discretion, by a legacy;¹ nor when they consist in improvements to the defendant's real estate, he not having asked to have the work done, or actively acquiesced in it;² nor when the circumstances are, for other reasons, inconsistent with the hypothesis of a business engagement.³

§ 720. When a stated salary is given, an officer is obliged, as a rule, to give his whole time, and cannot sue for extra compensation on a *quantum meruit*.⁴ Thus, when a salaried officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover special compensation therefor, unless it has been specially agreed that he should be so compensated.⁵ It is otherwise as to

Nor where there is a stated salary or other fixed compensation.

St. 480; *Moist's App.*, 74 Penn. St. 166. That there is no implied contract to pay even an adult son assisting his father, see *Zerbe v. Miller*, 16 Penn. St. 488; *Mosteller's App.*, 30 Penn. St. 473.

¹ *Baxter v. Gray*, 3 M. & G. 771; *Little v. Dawson*, 4 Dall. 111; *Walker's Est.*, 3 Rawle, 243; *Neal v. Gilmore*, 79 Penn. St. 421. That though there can be no recovery for services rendered on the mere expectation of a legacy, there can be recovery for services to a deceased person who has contracted to pay for them by provision in his will, but has neglected to make such provision, see *Miller v. Lash*, 85 N. C. 51.

² *Munro v. Butt*, 8 E. & B. 738; *Patterson v. Luckley*, L. R. 10 Ex. 330; see *supra*, § 22.

³ *Fitch v. Peckham*, 16 Vt. 150; *Spring v. Hulett*, 104 Mass. 591; *supra*, § 22; *White v. Corlies*, 46 N. Y. 467. In *Taylor v. Laird*, 25 L. J. Exch. 329, 1 H. & N. 266, the captain of a ship, after a contract to take command for a certain voyage at fixed wages, abandoned the command during the voyage, but afterwards, without being asked,

rendered services in navigating the ship to her home port. He sued for his services, but it was held that as the defendant had not invited or knowingly permitted the services, and had repudiated them when brought to his notice, he could not be made liable. *Anson*, *ut supra*, 16; *Leake*, 2d ed. 59. In a case in New York, in 1880, it appeared that the plaintiff and the defendant who were in the habit of having business transactions together to a large amount, were accustomed from time to time to render each other services of courtesy not to be brought into the accounts. It was held that these services were matters of mutual accommodation, to be regarded as gratuitous. *Potter v. Carpenter*, 76 N. Y. 157.

⁴ *Supra*, §§ 500-2; *infra*, § 720.

⁵ *New York, etc. R. R. v. Ketchum*, 27 Conn. 180; *Loan Ass. v. Stonemetz*, 29 Penn. St. 534; *Kilpatrick v. Bridge Co.*, 49 Penn. St. 121; *Merrick v. Coal Co.*, 61 Ill. 472; *Cheeny v. R. R.*, 68 Ill. 570; *Holder v. R. R.*, 71 Ill. 106; *Franz v. R. R.*, 55 Iowa, 107. See *Condon v. Jersey City*, 43 N. J. L. 452; and cases *supra*, § 502.

extraordinary services not in the line of his duties.¹ An apprentice, also, cannot recover from his master for extra work, even though there be a promise to pay.²

§ 721. As analogous to the above rulings may be considered those in which it is held that a party who takes land on which there are burdens may bind himself, by the mere fact of taking the land, to pay such burdens. That in such cases the party holding the incumbrance may, in most jurisdictions, sue, we will see hereafter.³ It is now to be observed that a party accepting a deed-poll, binds himself to perform any conditions implied by the deed. "By the law of this commonwealth, affirmed by many decisions, the grantee, by the acceptance of the deed, becomes liable to perform, according to its terms, any promise or undertaking therein expressed to be made in his behalf, although, not having himself signed the deed, he must, while the old forms of action were retained, have been sued in *assumpsit* and not in *covenant*."⁴ "The fact that the defendant has since sold all the lands to a third person affords no reason for denying or limiting his liability on his agreement with the plaintiff."⁵

Vendee taking land may agree to pay burdens.

¹ *Frauz v. R. R.*, *ut supra*.

² *Bailey v. King*, 1 Whart. 113; *supra*, § 500.

³ See *infra*, § 786 a.

⁴ *Gray, C. J.*, *Locke v. Homer*, 131 Mass. 103, citing *Fenton v. Lord*, 128 Mass. 466; *Dickason v. Williams*, 129

Mass. 182; *Coolidge v. Smith*, 129

Mass. 554; *Rogers v. Fire Co.*, 9 Wend. 611; *Rawson v. Copland*, 2 Sand. Ch. 251. See *Muhlig v. Fiske*, 131 Mass. 113.

⁵ *Gray, C. J.*, *Reed v. Paul*, 131 Mass. 132.

CHAPTER XXIII.

MONEY HAD AND RECEIVED.

General rule that suit for money had and received may be maintained where one person receives money for another, § 722.

Money must have been received to plaintiff's use, § 723.

I. MONEY RECEIVED BY ONE PERSON FOR ANOTHER.

Agent liable to principal subject to terms of agency, § 724.

Even though object be illegal, § 725.

So of trustee who admits balance, § 726.

Executor not liable to distributees unless on admitted claim, § 727.

Money received to use of third party cannot be sued for by such party without acknowledgment, § 728.

Stakeholder not liable until contingency occurs, § 729.

II. MONEY WRONGFULLY OBTAINED.

Money wrongfully obtained may be sued for as money received to plaintiff's use, § 730.

A. may recover proceeds of his property wrongfully sold by B., § 731.

When A.'s money in B.'s hands is wrongfully obtained from B. by C., it may be recovered from C. by A., § 732.

Such money cannot be pursued in hands of strangers, § 733.

Goods fraudulently obtained may be followed into other hands, § 734.

Election to waive tort when made is final, § 735.

Value of goods unlawfully obtained may be recovered back, § 736.

Money obtained by extortion may be recovered back, § 737.

So of money obtained by carriers, hotel keepers, and public officers, § 738.

Proceeds of goods wrongfully sold may be recovered from sheriff, § 739.

Money obtained by legal process cannot be recovered back, § 740.

Nor can money paid for illegal purposes, § 741.

III. MONEY PAID WITHOUT CONSIDERATION.

Money paid on an inoperative contract may be recovered back, § 742.

Deposit on real estate may be recovered back on failure to make title, § 743.

Money paid for worthless securities may be recovered back, § 744.

Money paid cannot be recovered back when contract is prevented from completion by *casus*, § 745.

When title of goods is warranted, price can be recovered back; and so when there is breach of warranty going to whole consideration, § 746.

When failure of consideration is imputable to plaintiff, he cannot recover, § 747.

On partial failure of consideration, price when entire cannot be recovered back, § 748.

A party buying on speculation and losing cannot recover back, § 749.

Compromise money paid voluntarily cannot be recovered back, § 750.

Money paid from motives of policy or kindness cannot be recovered back, nor debts of honor, § 751.

IV. MONEY PAID IN MISTAKE.

Money paid in mistake of fact may be recovered back, § 752.

Merely negligence does not preclude party from recovering, § 753.

Money paid in mistake of law cannot be recovered back, § 754.

When money paid by third person to agent can be recovered back, § 755.

§ 722. WHEN money is received by one party to another's use in such a way that a contractual relation may be assumed to exist between them, or where money is taken wrongfully by one party from another, or is paid without consideration, or is paid in mistake, an action for money had and received may at common law be maintained by the party for whose benefit the money should be held against the party holding the money. In such cases, however, it must appear that the defendant received money; not merely money's worth, such as stock or goods.¹—Lord Mansfield, in a famous judgment, speaks of a suit for money had and received “as a kind of equitable action;”² and though in England this was once regarded as going too far,³ yet in this country, in part from the convenience of the procedure, in part in some jurisdictions from lack of a distinctive court of chancery, Lord Mansfield's opinion has been accepted in many jurisdictions, and liability maintained for money had and received in all cases in which equity would hold a party responsible for money which he ought rightfully to pay another.⁴ And even in England the preponderance of opinion is in conformity with the views of Lord Mansfield, that “where money is due *ex aequo et bono*, it may be recovered in an ac-

When one party ought to hold money to another's use, suit for money had and received may be maintained.

¹ Chitty on Pl. 10th Am. ed. (1879) 362; Marsh v. Keating, 1 Bing. N. C. 198; Beardsley v. Root, 11 John. 464; Ralston v. Bell, 2 Dall. 242; Hantz v. Sealey, 6 Binn. 405, and cases cited *infra*, § 723.

² Moses v. Macfarlan, 2 Burr. 1012.

³ Miller v. Atlee, 3 Ex. 799; Johnson v. Johnson, 3 B. & P. 169.

⁴ Allen v. McKeen, 1 Sumner, 317;

Herrin v. Libby, 36 Me. 350; Knapp v. Hobbs, 50 N. H. 478; Bogart v. Nevins, 6 S. & R. 369; Irvine v. Hanlon, 10 S. & R. 219; Harvey v. Turner, 4 Rawle, 223; Arrott v. Brown, 6 Whart. 9; Neff v. Horner, 63 Penn. St. 329; American Steamship Co. v. Young, 89 Penn. St. 186; Gallagher v. Frorer, 4 Ill. Ap. 330.

tion" of this class.¹ This is *a fortiori* the case under recent legislation prescribing that when there is a conflict between common law and equitable doctrine the latter is to prevail.

§ 723. To sustain an action of this class it is not necessary that there should be express contractual relations between the plaintiff and the defendant.² It is enough if such relations can be implied from the facts. A party who knowingly receives money as agent for another, such agency being either express or implied from the nature of the transaction, is bound to pay the money so received over to such other person.³ Thus, when one of two joint contractors receives the money due them both, he is liable to the other in a suit for money had and received.⁴ Money, however, must have been received, and the action does not lie to recover specific articles which, though reducible to money, have not been so reduced.⁵ Hence, bank stock or other securities cannot be recovered *in specie* in this form of action.⁶ But, on proof of the reception by the defendant of whatever passes as currency—*e. g.*, bank notes—there may be a recovery, if the property be in the plaintiff, and the other constituents of the action are made out.⁷ And when articles are readily converted into cash, and when the probability is, from the nature of the case, that they were so converted by the defendant, it will require but slight extrinsic indications to support the inference of such conversion.⁸

¹ 2 Ch. on Cont. 11th Am. ed. 898; *Walker*, 4 B. & C. 163; *Marsh v. Keating*, 1 Bing. N. C. 198; *Morgan v. Elford*, L. R. 4 C. D. 352; *Beardsley v. Root*, 11 Johns. 464; *Hantz v. Sealey*, 6 Binn. 405.

² *Infra*, §§ 732 *et seq.*; *Mason v. Waite*, 17 Mass. 563; *Harper v. Claxton*, 62 Ala. 46.

³ *Infra*, § 728; *Marshall v. Hopkins*, 15 East, 309; *Clarence v. Marshall*, 2 C. & M. 495; *Knapp v. Hobbs*, 50 N. H. 476; *Carnegie v. Morrison*, 2 Met. 396; *Eagle Bank v. Smith*, 5 Conn. 71.

⁴ *Kelly v. Evans*, 3 Pen. & W. 387; *Galbreath v. Moore*, 2 Watts, 86.

⁵ 2 Ch. on Cont. 11th Am. ed. 902; *Moore v. Pyke*, 11 East, 52; *Wharton v.*

Walker, 4 B. & C. 163; *Marsh v. Keating*, 1 Bing. N. C. 198; *Morgan v. Elford*, L. R. 4 C. D. 352; *Beardsley v. Root*, 11 Johns. 464; *Hantz v. Sealey*, 6 Binn. 405.

⁶ *Infra*, §§ 734-736; *Nightingale v. Devisme*, 5 Burr. 2589; *M'Lachlan v. Evans*, 1 Y. & J. 380.

⁷ *Floyd v. Day*, 3 Mass. 403; *Payson v. Whitcomb*, 15 Pick. 212; *Emerson v. Baylies*, 19 Pick. 55; *Shepard v. Palmer*, 6 Conn. 95; *Ainslie v. Wilson*, 7 Cow. 662.

⁸ *Infra*, § 731; *Longchamp v. Kenny*, 1 Dougl. 137; *Whitwell v. Bennett*, 3

A party, also, who makes himself liable for money had and received, is estopped from saying that the money was not actually in his custody.¹ But the title to land cannot be tried in this form of action.²—As will be hereafter seen, the rule in England and in some jurisdictions in this country is that the plaintiff cannot recover in this or any other contractual suit, unless an acknowledgment of indebtedness from the defendant to the plaintiff can be implied from all the circumstances of the case.³ But the great preponderance of authority in this country is to the effect that it is not necessary to enable a plaintiff to sue on a contract that he should have been a party to it.⁴

I. MONEY RECEIVED BY ONE PERSON FOR ANOTHER.

§ 724. Where an agent receives money from his principal for specific objects, and the principal revokes the directions before the money is appropriated, the agent is liable to the principal in an action for money had and received.⁵ An agent, also, who repudiates his principal's authority, or who disposes of the principal's property in violation of orders, is at any time liable in this form of action for the money in his hands.⁶ An agent, also, intrusted with an article to sell may in this way be sued for the proceeds, whether the sale was for money or not.⁷ But when an agent, when performing his duties as such, loses money employed at the time in the agency, the

Agent
liable to
principal
subject to
terms of
agency.

B. & P. 559; *Hunter v. Welsh*, 1 Stark. 178; *Hatten v. Robinson*, 4 Blackf. 480.

¹ *Jackson v. Mayo*, 11 Mass. 152; *Emerson v. Baylies*, 19 Pick. 55.

² *Ker v. Osborn*, 9 East, 378; *Clarence v. Marshall*, 2 C. & M. 495; *Wyman v. Hook*, 2 Greenl. 338; *Bigelow v. Jones*, 10 Pick. 165; *Baker v. Howell*, 6 S. & R. 481; and other cases cited 2 Ch. on Cont. 11th Am. ed. 907.

³ *Infra*, § 728.

⁴ *Infra*, §§ 728, 786 *et seq.* 794.

⁵ *Leake*, 2d ed. 113; *Wh. on Agency*, § 250; *Taylor v. Lendey*, 9 East, 49; *Fletcher v. Marshall*, 15 M. & W. 755; *Parry v. Roberts*, 3 A. & E. 118; *Schee v. Hassinger*, 2 Binn. 325.

⁶ *Ibid.*; *Thorpe v. Thorpe*, 3 B. & Ad. 580; *Parry v. Roberts*, 3 A. & E. 718; *Fletcher v. Marshall*, 15 M. & W. 755; *Hemenway v. Hemenway*, 5 Pick. 389; *Jackson v. Baker*, 6 Cow. 183; *Chinn v. Chinn*, 22 La. An. 599.

⁷ *Miller v. Miller*, 7 Pick. 136.

remedy against him is, not a suit for money had and received, for to this the answer would be that he had employed the money as the principal directed, but an action on the case for negligence.¹—A previous demand is not necessary to sustain an action against a factor who improperly neglects to render an account of sales.²

§ 725. Even when a traffic is illegal, an agent receiving money to engage in it will not be entitled to retain as against his principal such money after the agent's authority is revoked,³ supposing the object of the suit be not to obtain a share in illegal profits.⁴ Nor can an agent, where part of the consideration was illegal, set up, after the accounts between him and the principal are closed, the illegal taint.⁵ But if the act of constituting the agency be itself a substantive crime, then there can be no recovery.⁶

¹ Wh. on Agency, §§ 277, 306, 537; Wh. on Neg. § 156; Parry v. Roberts, 3 A. & E. 118; Mazetti v. Williams, 1 B. & Ad. 415; Wilson v. Short, 6 Hare, 366; Farebrother v. Ansley, 1 Camp. 343; Bell v. Cunningham, 3 Pet. 69; Dodge v. Tileston, 12 Pick. 325; Hinde v. Smith, 6 Lansing, 464; Arrott v. Brown, 6 Whart. 9; Harvey v. Turner, 4 Rawle, 223; Gilson v. Collins, 66 Ill. 136.

² *Supra*, § 575; Chapman v. Shaw, 5 Greenl. 59; Langley v. Sturtevant, 7 Pick. 214; Cooley v. Betts, 24 Wend. 203; Witherup v. Hill, 9 S. & R. 11. One of several heirs agreed with the co-heirs to purchase certain shares of stock in a corporation for their joint benefit, he taking the conveyance, and the other heirs contributing their respective proportions of the purchase-money, subject to future adjustment. He refused, on acquiring title to the shares, to make any adjustment, informing the others that he had concluded to keep the stock himself. It

was held in Massachusetts in 1880 that under such circumstances he was accountable in this form of action to the several heirs for their respective shares of the dividends. *Colt v. Clapp*, 127 Mass. 476.

³ *Supra*, § 357; Taylor v. Lendey, 9 East, 49; Fletcher v. Marshall, 15 M. & W. 755; Parry v. Roberts, 3 A. & E. 118; Planters' Bk. v. Union Bk., 16 Wall. 483; Lestapies v. Ingraham, 5 Barr, 71; Daniels v. Barney, 22 Ind. 209; Chinn v. Chinn, 22 La. An. 599; and cases cited *supra*, § 357; see, also, §§ 335, 341, 343, 352.

⁴ Buck v. Albee, 26 Vt. 184; Lemon v. Grosskopf, 22 Wis. 447; cited Wald's Pollock, 328-9.

⁵ *Ibid.*; Farmer v. Russell, 1 B. & P. 296; Bonsfield v. Wilson, 16 M. & W. 185; Nicholson v. Gooch, 5 E. & B. 999; Murray v. Vanderbilt, 39 Barb. 140; Gilliam v. Brown, 43 Miss. 641; Anderson v. Moncrieff, 3 Desaus. 124; and see cases cited *supra*, §§ 338, 357.

⁶ *Supra*, §§ 353-7.

§ 726. A trustee, so far as concerns funds flowing into his hands in his fiduciary capacity, is not liable in this form of action to the *cestui que trust*, until account stated, or until a sum is specifically set apart by him as due the latter in an action for money had and received. The procedure must be in equity.

Trustee who admits balance due *cestui que trust* is thus liable.

"No action at law for money had and received, can be maintained against him, though he has money in his hands which, under the terms of the trust, he ought to pay over to the *cestui que trust*, but which he still holds in the character of trustee only."¹ It is otherwise as to balances conceded to be due.—"If the trustee by appropriating a sum as payable to the *cestui que trust* or otherwise, admits that he holds it to be paid to the *cestui que trust* and for his use, the character of the relation between the parties is changed, and the trustee does not hold it as a trustee, properly so called, but as a receiver, for the other party, who may maintain an action at law for money had and received."²—The fact that a trust is so constructed as to involve in its execution acts contravening a statute does not relieve the trustee from his liability to pay over an admitted balance when demanded by the *cestui que trust*.³—A trustee who mingles trust-money with his own funds, is liable for interest,⁴ and is liable for compound interest in case of any negligence, or in case of his using the money in business.⁵ If he fail to distinguish between his funds and his principal's, in a common mass, the aggregate will be charged to him as his principal's.⁶

¹ Per cur. in *Edwards v. Lowndes*, 1 E. & B. 89; adopted in *Leake*, 2d ed. 116; *Pardoe v. Price*, 16 M. & W. 451; *Hexter v. Loughry*, 6 Ill. App. 362.

² Per cur. in *Edwards v. Lowndes*, 1 E. & B. 891; *Remon v. Hayward*, 2 A. & E. 666; see *Boynton v. Dyer*, 18 Pick. 6; *Jenkins v. Walter*, 8 Gill & J. 218.

³ *Supra*, §§ 335, 341, 343, 352; *Sheppard v. Oxenford*, 1 K. & J. 491; *Worthington v. Curtis*, L. R. 1 C. D. 419.

⁴ Wh. on Ag. §§ 243, 788; *Barney v. Saunders*, 16 How. U. S. 535; *Green v. Winter*, 1 Johns. Ch. 26; *Jacot v. Emmett*, 11 Paige, 142; *Dyott's Est.*, 2 Watts & S. 565; *Graver's App.*, 50 Penn. St. 189; *Jenkins v. Walter*, 8 Gill & J. 218.

⁵ *Boynton v. Dyer*, 18 Pick. 1; *Evertson v. Tappan*, 5 Johns. Ch. 497; *Luken's App.*, 7 W. & S. 48; *Rowan v. Kirkpatrick*, 14 Ill. 1; see *Norris's App.*, 71 Penn. St. 106.

⁶ Wh. on Agency, § 203.

§ 727. Distributive interests in an estate cannot ordinarily be sued for, when in the hands of an executor, as money had and received. The proceeding must be in the probate or other court having jurisdiction.¹ But when an executor admits that he holds a specific fund to the use of a particular legatee, then he can be sued for such fund in an action for money had and received.² And such, also, is the rule as to distributive shares admitted to be due.³ He is, also, thus liable for money lent to him, or had and received by him as executor.⁴

§ 728. Where A. receives money from B. to be paid to C. (as where B. deposits money with A. to C.'s credit), A. is not, as a rule, liable to C. in an action for money had and received, unless there is an acknowledgment on A.'s part to C. that he holds the money to C.'s order, or unless agency be proved.⁵ A banker, for instance, who receives money to meet a bill, is not, without a prior notification or acknowledgment to the holder, or an undertaking by him to the holder, liable to the holder for the amount, since, until such notification, the money could be recalled by the depositor.⁶ Nor has the holder, without some such relation between them, any claim in equity.⁷ And, as a general rule, an order to a banker or other agent to hold money due the principal to the order of a third person does not enable the remittee to sue the agent in an action for money had and received until there is an acknowledgment by the agent of the claim of the remittee.⁸ Thus, where P. re-

¹ Jones v. Tanner, 7 B. & C. 542; Barlow v. Browne, 16 M. & W. 126; see Gregory v. Harman, 3 C. & P. 205.

² Topham v. Morecroft, 8 E. & B. 972; Howard v. Brownhill, 23 L. J. Q. B. 23.

³ Wilson v. Wilson, 3 Binn. 557.

⁴ Ashby v. Ashby, 7 B. & C. 444; Powell v. Graham, 7 Taunt. 586; see Dowse v. Cox, 3 Bing. 20.

⁵ See *supra*, §§ 506-7; *infra*, § 794; Leake, 2d ed. 115; Dicey on Parties, 93; Williams v. Everett, 14 East, 582;

see *infra*, §§ 852 *et seq.*

⁶ Leake, 2d ed. 115, citing Moore v. Bushell, 27 L. J. Ex. 3. See *supra*, §§ 506-7; *infra*, § 794.

⁷ Hill v. Royds, L. R. 8 Eq. 290.

⁸ Malcolm v. Scott, 5 Exch. 601; Brind v. Hampshire, 1 M. & W. 365;

mitted to B. a bank note, endorsed "pay to the order of B. under provision for my note in favor of C., payable at the house of B., on 1st January, 1830;" and B. received the proceeds of the note, but refused to pay them over to C.; it was held that C. could not maintain an action for money had and received against B., because B. had never agreed to hold the money for C.'s benefit.¹ To entitle the remittee to recover, the depositor should, it has been held, have lost control over the deposit.² But the undertaking may be made by the depositary to the depositor as agent for the party in whose favor the deposit was made. In this case there is liability from the depositary to the party beneficially interested.³ And when the party accepting the deposit has entered into an engagement to hold for the remittee, then the remittee may maintain the suit.⁴—That when A. is indebted to B. and B. is indebted to C., A.'s debt may by an agreement between A., B., and C., be placed to the credit of C., was asserted by Buller, J., in an early case;⁵ and has been since then recognized as settled law.⁶ Such an arrangement is virtually a novation; a new contract being formed on a sufficient consideration, and the old contract being extinguished.⁷—As has been already seen,⁸ it is held in England, and in several states in this country, that

Carey v. Adkins, 4 Camp. 93; Tiernan v. Jackson, 5 Pet. 580; Carnegie v. Morrison, 2 Met. 396. See, however, discussion *infra*, §§ 784 *et seq.*

¹ Wedlake v. Hurley, 1 C. & J. 83, *aff.* Williams v. Everett, 14 East, 582; Gibson v. Minet, R. & M. 68.

² Seaman v. Whitney, 24 Wend. 260.

³ Wh. on Agency, §§ 4, 5, 147, 398; *supra*, § 723; *infra*, § 794. See Lilly v. Hays, 5 A. & E. 548.

In Surtees v. Hubbard, 4 Esp. 203, Lord Ellenborough says: "Choses in action are not generally assignable. Where a party entitled to money assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent; he may have an account against the as-

signor, and wish to have his set-off; but if there is anything like an assent on the part of the holder of the money, in that case I think that this, which is an equitable action" (money had and received), "is maintainable."

See Jones v. Carter, 8 Q. B. 134. That there must be an acknowledgment between the parties to constitute a contractual relation, see Noble v. Discount Co., 5 H. & N. 225; Cuxon v. Chadley, 3 B. & C. 591.

⁴ Griffin v. Weatherby, L. R. 3 Q. B. 753; Walker v. Rostron, 9 M. & W. 411; Cobb v. Becke, 6 Q. B. 930; Wyman v. Smith, 2 Sandf. 331.

⁵ Tatlock v. Harris, 3 T. R. 180.

⁶ See *infra*, §§ 852 *et seq.*

⁷ Ibid.

⁸ *Supra*, § 506; and see *infra*, § 784.

there must be a contractual relation, express or implied, between the plaintiff and the defendant, to sustain the suit. Thus, it was held in Massachusetts in 1880, that F., a party who receives money as his own from an executor who pays it under a mistake to F. instead of to L., cannot be made liable, in an action for money had and received, to L., the person entitled under the will to receive the money.¹ On the other hand, the opinion which, however unsustained in principle, is now accepted in most jurisdictions in this country, is that where A. gives money to B., to which C. is entitled, and for C.'s use, suit may be brought for this money by C.² Hence, it was held in Michigan in 1880, that where an arrangement was made whereby E. was to deduct from the wages of his workmen the amount due for goods sold them by S.; but E., after making the deduction, refused to pay over the amount to S., S. might maintain an action for money had and received on the agreement against E.³

§ 729. When money is deposited with a stakeholder, he is not liable in an action for money had and received until the contingency happens upon which the money is payable, unless such contingency be no longer possible, in which case the money is payable to the party depositing it, if not otherwise provided by the agreement under which the deposit is made.⁴ An auctioneer is thus bound with regard to a deposit received by him at an auction. If the sale is perfected, it goes to make up the purchase money. But if the sale be not perfected, and it is not by the terms of sale applicable to costs, it may be recovered back by the depositor in an action for money had and received.⁵ If a wager be illegal, either party may claim his

¹ *Moore v. Moore*, 127 Mass. 22.

² *Infra*, § 755.

³ *Donkersley v. Levy*, 38 Mich. 54.

⁴ *Supra*, §§ 593 *et seq.*; *Leake*, 2d ed. 116; *Brown v. Overbury*, 11 Ex. 715; *Dines v. Wolfe*, L. R. 2 P. C. 280; *Eltham v. Kingsman*, 1 B. & Ald. 683; *Smith v. Briggs*, 3 Denio, 73. That the stakeholder cannot set up in de-

fence a payment in violation of his instructions, see *Cowling v. Beachum*, 7 Moore, 465; *Wilkinson v. Godefroy*, 9 A. & E. 536.

⁵ *Edwards v. Hodding*, 5 Taunt. 815; *Duncan v. Cafe*, 2 M. & W. 244; *Harrington v. Hoggart*, 1 B. & Ad. 586; *Spittle v. Lavender*, 5 Moore, 270.

deposit before it is paid over,¹ even though the party claiming is the losing party to the illegal wager to meet which the money was deposited.² At common law, where a stakeholder in an illegal wager has paid the deposit to the winner, before notice or demand, the loser cannot recover from the stakeholder;³ though it may be recovered from the winner.⁴ But in New York if the suit be special under the statute, the loser can recover the deposit from the stakeholder even after the deposit has been paid over to the winner.⁵ *A fortiori* he may recover it in the hands of a mere depository.⁶ Under the statute 8 & 9 Vict. ch. 109, no suit can be maintained for the recovery of money deposited to abide the result of a wager. And generally money paid on gambling debts cannot be recovered back.⁷—In a suit for money had and received against a stakeholder, the court will mould the execution in such a way as to best subserve the equity of the case.⁸

II. MONEY WRONGFULLY OBTAINED.

§ 730. A party who has been wrongfully dispossessed of his money or goods by another may either sue in tort, claiming damages for the injury sustained by him, or, electing to repudiate the sale, he may sue the wrong-doer on an implied contract, alleging a receiving of money to the plaintiff's use. Thus money obtained from A. by B. by false pretences

Money wrongfully obtained may be sued for as money received to plaintiff's use.

¹ *Gatty v. Field*, 9 Q. B. 431; *Hastelton v. Jackson*, 8 B. & C. 221; *Eltham v. Kingsman*, 1 B. & Ald. 683; see *Phillips v. Ives*, 1 Rawle, 36; *supra*, § 452.

² *Supra*, § 454; *Cotton v. Thurland*, 5 T. R. 405; *Martin v. Hewson*, 10 Exch. 737; *Manning v. Purcell*, 7 De G. M. & G. 55; see *White v. Bank*, 22 Pick. 189; *Ball v. Gilbert*, 12 Met. 397; *Vischer v. Yeates*, 11 John. 23; *Rust v. Gott*, 9 Cow. 169; *Like v. Thompson*, 9 Barb. 315; *Livingstone v. Wootan*, 1 N. & McC. 178. As to distinctive statutes on betting, see *supra*, § 452.

³ *Howson v. Hancock*, 8 T. R. 575; *Perkins v. Eaton*, 3 N. H. 152; *Worcester v. Eaton*, 11 Mass. 375; *McCullum v. Gourlay*, 8 Johns. 147. As to wagers, see more fully *supra*, §§ 352, 449 *et seq.*

⁴ *McKee v. Manice*, 11 Cush. 357.

⁵ *Ruckman v. Pitcher*, 1 Comst. 392; S. C., 20 N. Y. 9; *Like v. Thompson*, 9 Barb. 315.

⁶ *Woodworth v. Bennett*, 43 N. Y. 273; see for cases in other states, *supra*, § 452.

⁷ *Supra*, § 452.

⁸ *Aycinena v. Peries*, 6 W. & S. 243; S. C., 2 Barr, 286.

may be recovered back as money received by B. to A.'s use;¹ A. offering to return to B. whatever he had received from B. in exchange.² Money, also, received by means of forgery can in this way be recovered back, although there was no contract of any kind between the parties;³ and so of an overpayment induced by a vendor's deceit;⁴ and so of money obtained by imposition,⁵ or by any other tort.⁶ An insurance company, in accordance with the rule above stated, may sue in this form of action to recover back the amount paid on a loss, when the policy was avoided by fraudulent representations as to the extent of the loss; nor need the company return the receipt for the amount so paid before bringing suit.⁷ In this form of suit all special damages are waived, and the plaintiff's claim

¹ *Supra*, §§ 282, 520; Leake, 2d ed. 90; Benj. on Sales, 3d Am. ed. § 452; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 C. & M. 207; *Holt v. Ely*, 1 E. & B. 795; *Edmeads v. Newman*, 1 B. & C. 418; *Martin v. Morgan*, 1 B. & B. 289; *Farris v. Ware*, 60 Me. 482; *Manahan v. Noyes*, 52 N. H. 232; *Gates v. Bliss*, 43 Vt. 299; *Ripley v. Gelston*, 9 John. 201; *Tugman v. Steamship Co.*, 76 N. Y. 207; *Willet v. Willet*, 3 Watts, 277; *Matthews v. Pearson*, 13 S. & R. 258; *Pierce v. Wilson*, 34 Ala. 596; *O'Conley v. Natchez*, 1 Sm. & M. 31; see *Higgins v. Mendenhall*, 51 Iowa, 135.

² *Clarke v. Dickson*, E. B. & E. 148; *Norton v. Young*, 3 Greenl. 30; *Cushing v. Wyman*, 38 Me. 589; *Getchell v. Chase*, 37 N. H. 110; *Downer v. Smith*, 32 Vt. 1; *Perkins v. Bailey*, 99 Mass. 61; *Hoopes v. Strasburger*, 37 Md. 390; *Shaw v. Barnhart*, 17 Ind. 183; *Haase v. Mitchell*, 58 Ind. 213; *Warren v. Tyler*, 81 Ill. 15; see more fully *supra*, §§ 282, 520 *et seq.*

³ *Marsh v. Keating*, 1 Bing. N. C. 198; *Ripley v. Gelston*, 9 Johns. 201; *Beardslee v. Richardson*, 11 Wend. 25.

⁴ *Bernard v. Colwell*, 39 Mich. 215.

⁵ *O'Conley v. Natchez*, 1 Sm. & M. 31.

⁶ *Pratt v. Vizard*, 5 B. & Ad. 808; *Richardson v. Kimball*, 28 Me. 463; *Miller v. Miller*, 7 Pick. 133; *Gilmore v. Wilbur*, 12 Pick. 120; *Stockett v. Watkins*, 2 Gill & J. 326; see *Lane v. Smith*, 68 Me. 178. In *Smart v. White*, 73 Me. 332, it was held that money received from a United States pensioner in excess of the statutory allowance for services in obtaining a pension may be recovered of the taker by the pensioner, although obtained from him without any wrongful intention, irrespective of the question whether the pensioner when paying or allowing the sum knew of the statutory protection or not. The defendant is not screened from liability because he was an agent merely, and had paid the money to his principal before suit brought or demand made upon him. He is a principal in perpetrating the wrong. See further *supra*, § 353, as to effect of complicity in such cases. That money obtained by duress can be recovered back, see *supra*, § 144.

⁷ *Johnson v. Ins. Co.*, 39 Mich. 33.

reduced exclusively and finally to money had and received.¹—A party who has obtained that which it is his duty to pay over to another, cannot set up that the reception was by his own wrong. In other words he cannot say, "I got it by a tort, and in tort alone can I be sued." Thus when a broker employed to sell a ship improperly received commissions from the purchaser, it was held that the vendor, the broker's principal, might recover of the broker the commissions the broker received, there being no custom by which commissions of this kind were sustained.²—All profits which an agent makes out of the trust business, no matter how improperly, belong to his principal, nor can he set up against his principal the impropriety of the transaction.³—And where an apprentice is inveigled away from his master, and his services obtained by a third party, the master can recover the value of these services from the third party, nor can the latter set up the tortious character of the transaction, and claim that he is to be sued in tort alone. The tort can be waived by the master and the implied contract sued on.⁴ Nor is it a defence to such a suit that the defendant did not know that the party employed was an apprentice.⁵

§ 731. If A.'s property is wrongfully sold by B., A., waiving the tort, may sue for the proceeds in B.'s hands, as money received to A.'s use; and this applies to a sale of real property,⁶ as well as of personal,⁷ as where coal is wrongfully severed and sold by the

A. may recover proceeds of his property wrongfully sold by B.

¹ *Lythgoe v. Vernon*, 5 H. & N. 180; 352, 357 for authorities; *Lightly v. Brown v. Holbrook*, 4 Gray, 102; *Clouston*, 1 Taunt. 112; *Foster v. Wilder v. Aldrich*, 2 R. I. 518. As generally sustaining the text, see *Mathers v. Pearson*, 13 S. & R. 258; *Vantine v. Wood*, 13 Penn. St. 270; *Shaffer v. Montgomery*, 65 Penn. St. 329.

⁵ *Bowes v. Tibbetts*, 7 Greenl. 457; *Munsey v. Goodwin*, 3 N. H. 272; *James v. LeRoy*, 6 Johns. 274; 2 Parsons, 52.

² *Morrison v. Thompson*, L. R. 9 Q. B. 480; *Dutton v. Wilbur*, 52 N. Y. 312; *Dodd v. Workman*, 26 N. J. Eq. 484; *Love v. Hoss*, 62 Ind. 255.

⁶ *Morgan v. Elford*, L. R. 4 C. D. 352; *Miller v. Miller*, 7 Pick. 136.

³ Wh. on Agency, §§ 232, 236, 244, 335, 716.

⁷ *Leake*, 2d ed. 93; *Dacey on Parties*, 91; *Collins v. Brook*, 5 H. & N. 700; *Holt v. Ely*, 1 E. & B. 795; *Burnap v. Partridge*, 3 Vt. 144.

⁴ *Leake*, 2d ed. 61; see *supra*, §§

owner of an adjacent mine,¹ and where trees on the plaintiff's land are wrongfully cut down and sold.²

§ 732. It is a false pretence, as is elsewhere shown, for a party to obtain money or goods from a bailee or other agent on the allegation of being sent for by the real owner.³ Hence, as a party obtaining money on false pretences may be charged with receiving such money to the owner's use, money thus obtained fraudulently from a third person may be recovered by the owner.⁴ And a party collecting rents on color of agency for the landlord, may be compelled to pay the money so received over to the landlord in an action for money had and received;⁵ though, if the money be received on claim of adverse title, the suit in this shape does not lie, as the reception was adverse, and not on pretence of agency.⁶ Wherever, as a general rule, the defendant receives money he knows belongs to the plaintiff, he is bound to pay such money to the plaintiff.⁷ But mere complicity in a criminal act does not make all parties concerned liable, in an action of this kind, to refund to parties injured any sums the latter may have lost by such guilty act. The defendant, to sustain such a suit, must be shown to have received money which had been acquired from the plaintiff, or to have been received ostensibly to the plaintiff's use.⁸

§ 733. Money, however, received by false pretences or false personation, cannot be followed into the hands of strangers

¹ *Ibid.*; *Powell v. Rees*, 7 A. & E. 600; *Connecticut R. R. v. Newell*, 31 426; *Phillips v. Homfray*, L. R. 6 Ch. Vt. 364; *James v. Hodsdon*, 47 Vt. 127; 770; *Ashton v. Stock*, L. R. 6 C. D. and see *supra*, §§ 282 *et seq.*; and see, 719; see *Haygarth v. Wearing*, L. R. as to frauds generally, §§ 232 *et seq.* 12 Eq. 320.

² *Hambly v. Trott*, 1 Cowp. 376; *Clarence v. Marshall*, 2 C. & M. 495.

Powell v. Layton, 2 B. & P. N. R. 370. ⁶ *Ibid.*; *Leake*, 2d ed. 90; *Hickman*

³ See *Wh. Cr. L.* 8th ed. § 1142; *v. Upsall*, L. R. 4 C. D. 144.

see *supra*, §§ 282 *et seq.* ⁷ *Supra*, § 723; *Barlow v. Browne*, 16 M. & W. 128; *Freeman v. Otis*, 9 Mass. 272; *Hall v. Marston*, 17 Mass. 579.

⁴ *Litt v. Martindale*, 18 C. B. 314; *Andrews v. Hawley*, 26 L. J. Ex. 323; cited *Leake*, 2d ed. 90; *Abbotts v. Barry*, 2 Brod. & B. 369; *Herrin v. Libby*, 36 Me. 350; *Hall v. Gilmore*, 40 Me. 578; *Christmas v. Spink*, 15 Ohio, 600; *National Trust Co. v. Gleason*, 77 N. Y. 400.

when such strangers have obtained possession of it *bona fide*, and for a good consideration.¹ It is otherwise, as to parties with notice, parties acting as agents or confederates of the wrong-doer, and parties who are not purchasers for value.²—The party obtaining the money fraudulently cannot by any device pass title to his assignee with notice;³ and the burden is on the holder to prove good faith and fairness.⁴—Where a purchaser of a promissory note, purporting to be endorsed by a savings bank, sues the bank on the alleged endorsement, he ratifies the purchase which he cannot afterwards attack as fraudulent; nor can he, in the same action, recover, under a count for money had and received, on the ground of fraud in the endorsement.⁵

Such money cannot be pursued into hands of strangers.

§ 734. We have already seen that no title to goods passes when only a bare charge is given to the transferee, and that no title passes by goods obtained by false personation.⁶ It may be added that with the single exception in England of sales in market overt, goods can, if no title be transferred, be followed into the hands even of parties without notice; or, in case of their sale by such parties, their price may be recovered by the owner.⁷ In this country, the exception of market overt does not exist.⁸ Negotiable paper, taken *bona fide* before maturity, does not fall within this rule.⁹ And ordinarily a person not taking

Goods fraudulently obtained may be followed into other hands.

¹ Leake, 2d ed. 91; Bigelow on Fraud, 308; Foster v. Green, 7 H. & N. 881; Hoffman v. Noble, 6 Met. 68; Ball v. Shell, 21 Wend. 222; Thompson v. Lee, 3 W. & S. 479; Thorpe v. Beavans, 73 N. C. 241.

² Ibid.; Atlee v. Backhouse, 3 M. & W. 633; Calland v. Loyd, 6 M. & W. 26; Pickett v. Barron, 29 Barb. 505; Blanchard v. Tyler, 12 Mich. 339.

³ *Supra*, § 292; Moody v. Blake, 117 Mass. 23; and cases cited in next section.

⁴ Easter v. Allen, 8 Allen, 7; Hoffman v. Strohecker, 9 Watts, 183. As to title of *bona fide* purchasers, see

supra, §§ 211, 291, 347, 352, 376. That persons without title cannot pass title, see *supra*, § 292.

⁵ Tappan v. Bank, 127 Mass. 107.

⁶ *Supra*, §§ 182–3, 292.

⁷ Bigelow on Fraud, 308; Glyn v. Baker, 13 East, 509; Kinder v. Shaw, 2 Mass. 398; Towne v. Collins, 14 Mass. 500; Williams v. Merle, 11 Wend. 80; see *supra*, § 183; Benj. on Sales, 3d Am. ed. §§ 7, 433.

⁸ Ventress v. Smith, 10 Pet. 176; Dame v. Baldwin, 8 Mass. 518; Easton v. Worthington, 5 S. & R. 130; Roland v. Gundy, 5 Ohio, 202.

⁹ Leake, 2d ed. 95; *supra*, § 539.

title cannot pass title, even to a *bona fide* purchaser for value.¹—The process for recovery of a chattel under such circumstances must be *in rem*. It cannot be for money had and received.²

§ 735. As is the case with election to rescind,³ an election to waive the tort, in cases of this class, and sue on the contract, when once made, is final.⁴ The election is evidenced by bringing a suit for the proceeds.⁵

“The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so, and bring his action for money had and received for the proceeds of goods wrongfully sold. The law implies, under such circumstances, a promise on the part of the tort-feasor that he will pay over the proceeds of the sale to the rightful owner. But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way.”⁶ Part reception of the proceeds, also, is a waiver of the tort; and the only remedy for the recovery of the residue is an action for money had and received.⁷

§ 736. When goods have been unlawfully obtained by B. and sold, A. may elect to waive the tort and to sue B. for the price as for money had and received.⁸ And a party *bona fide* purchasing lost or stolen goods is liable in trover to the original owner, or he may be liable for the price received by him for them, if

¹ *Supra*, §§ 183 *et seq.*, 292; *Hardman v. Booth*, 1 Hurl. & C. 803; *Lindsay v. Cundy*, L. R. 2 Q. B. D. 96; *Moody v. Blake*, 117 Mass. 23; *Wheelwright v. Depeyster*, 1 Johns. 471. As to goods transferred on bill of lading see *infra*, § 793.

² *Ibid.* *Infra*, § 736; *supra*, § 723.

³ *Supra*, § 290.

⁴ *Leake*, 2d ed. 94; *Bigelow on Fraud*, 403; *Abbotts v. Barry*, 2 Brod. & B. 369; *Hitchcock v. Covill*, 20 Wend. 167; 23 Wend. 611.

⁵ See *Panama Tel. Co. v. India Rub.*

Co., L. R. 10 Ch. 515, cited *supra*, § 583; *Christmas v. Spink*, 15 Ohio, 600.

⁶ *Bovill, C. J.*, *Smith v. Baker*, L. R. 8 C. P. 350.

⁷ *Lythgoe v. Vernon*, 5 H. & N. 180.

⁸ *Bigelow on Fraud*, 461; *Leake*, 2d ed. 91; *Benj. on Sales*, 3d Am. ed. §§ 6, 13; *Marsh v. Keating*, 1 Bing. N. C. 215; *Rodgers v. Maw*, 15 M. & W. 448; *Thurston v. Blanchard*, 22 Pick. 18; *Stanley v. Gaylord*, 1 Cush. 536; *Moody v. Blake*, 117 Mass. 23; *Barrett v. Warren*, 3 Hill, 348; *Heastings v. McGee*, 66 Penn. St. 354.

he has resold them.¹ Hence, where a power of attorney to sell stock was forged by one of a partnership, and the proceeds paid to the account of the partnership, it was held that the owner of the stock might recover the proceeds from the partnership as money had and received to his use.² An auctioneer, also, who innocently and ignorantly buys and sells stolen goods, is liable to the rightful owner in trover without a previous demand.³ A party, also, knowingly receiving partnership funds from a partner, is liable in money had and received to the firm.⁴ But a suit of this kind does not lie to recover the value of goods taken under a claim of right, when there has been no conversion.⁵ Nor can real actions be tried in this way.⁶

§ 737. When money is obtained by coercion or extortion, the acquiescence thus secured is a nullity,⁷ and the money may be recovered back in an action for money had and received to the plaintiff's use.⁸ Duress of goods, inducing the owner to pay money to release such goods, will be a basis for such a suit.

Money obtained by extortion can be recovered back.

"If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive; and the latter, in order to obtain possession of his property pays that sum; the money so paid is a payment made by compulsion, and may be recovered back."⁹ Hence when a mortgagor, with absolute power of

¹ *Clarke v. Dixon*, E. B. & E. 148; *Lee v. Bayes*, 18 C. B. 599; *Thnrstou v. Blanchard*, 22 Pick. 18; *Heckle v. Lurvey*, 101 Mass. 344; *Hoffman v. Carow*, 20 Wend. 21; *Roland v. Gundy*, 5 Ohio, 202; *Beazley v. Mitchell*, 9 Ala. 780; *Weed v. Page*, 7 Wis. 503.

² *Stone v. Marsh*, 6 B. & C. 551.

³ *Hoffman v. Carew*, 20 Wend. 21; S. C., 22 Wend. 285. Mr. Parsons (Cont. i. 520) says of this ruling that it "is certainly very severe." See *Courtis v. Cane*, 32 Vt. 232; *Hills v. Snell*, 104 Mass. 177; *Pease v. Smith*, 61 N. Y. 477.

⁴ *Croughton v. Forrest*, 17 Mo. 131.

⁵ *Supra*, § 734; *Bethlehem v. Fire Co.*, 81 Penn. St. 445; see *Pearsoll v. Chapin*, 44 Penn. St. 9.

⁶ *Lewis v. Robinson*, 10 Watts, 338.

⁷ *Supra*, §§ 144 *et seq.*, 149, 353.

⁸ *Oates v. Hudson*, 6 Exch. 346; *Chase v. Dwinall*, 7 Greenl. 134; *Worcester v. Eaton*, 11 Mass. 376; *Carey v. Prentice*, 1 Root, 91; *Ripley v. Gels-ton*, 9 Johns. 201; *Foshay v. Ferguson*, 5 Hill, 158; *supra*, § 353.

⁹ *Bayley, J.*, *Shaw v. Woodcock*, 7 B. & C. 84, adopted *Leake*, 2d ed. 96; as illustrations see *Pratt v. Vizard*, 5 B. & Ad. 808; *Wakefield v. Newton*, 6 Q. B. 276; *Maxwell v. Griswold*, 10

sale, threatens to use such power unless he be overpaid, the overpayment may be recovered back in an action for money had and received.¹ And money paid under duress of person, as by a false arrest, can be recovered back.² Duress of goods, however, though it may be the basis of a suit to recover back money paid to be relieved of it, will not be sufficient to avoid a contract induced by it; nor does mere fear of legal procedure have that effect.³—Excess of interest received on a usurious loan can, by this form of action, be recovered back when the plaintiff's necessity was operated on by the defendant so as to enforce the usurious terms;⁴ though it is held in Massachusetts, under the revised statutes, that excess of interest cannot be in this way recovered back.⁵

§ 738. As has been already noticed,⁶ a common carrier is regarded as so far a public officer that excessive payments extorted by him can be recovered back in an action for money had and received;⁷ and this is eminently the case with railway companies when imposing unequal and extortionate charges.⁸ A hotel keeper may be viewed in the same light; and if he makes an extortionate charge, money paid him under protest to meet such charge may be recovered back.⁹ Excessive fees extorted

How. 242; *Clinton v. Strong*, 9 Johns. 370; *Briggs v. Boyd*, 56 N. Y. 289; *Baldwin v. S. S. Co.*, 74 N. Y. 125; *Pemberton v. Williams*, 87 Ill. 15; *Schultz v. Culbertson*, 46 Wis. 313; *Kiewert v. Rindskopf*, 46 Wis. 481; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westburg*, 2 Bay, 211; and see cases cited *supra*, § 149.

¹ *Close v. Phipps*, 7 M. & G. 586. Money paid, however, as a matter of compromise, cannot be recovered back, *supra*, §§ 150, 486.

² *De Mesnil v. Dakin*, L. R. 3 Q. B. 18.

³ *Supra*, §§ 149, 150; *infra*, § 740.

⁴ *Williams v. Hedley*, 8 East, 383; *Smith v. Bromley*, 2 Dougl. 697; *Pierce v. Conant*, 25 Me. 33; *Willie v. Green*, 2 N. H. 333; *Boardman v. Roe*, 13 Mass. 105; *Wheaton v. Hibbard*, 20

Johns. 290; *Bond v. Jones*, 8 Sm. & M. 368.

⁵ *Crosby v. Bennett*, 7 Met. 17.

⁶ *Supra*, § 149.

⁷ *Leake*, 21 ed. 99; *Ashmole v. Wainwright*, 2 Q. B. 837; *Tamva Co. v. Simpson*, 19 C. B. N. S. 453; and cases cited, *supra*, § 149.

⁸ *Parker v. R. R.*, 7 M. & G. 253; *Great West. R. R. v. Sutton*, L. R. 4 H. L. 226; *Lancashire R. R. v. Gidlow*, L. R. 7 H. L. 527; *Evershed v. R. R.*, L. R. 2 Q. B. D. 254; *Baxendale v. R. R.*, 14 C. B. N. S. 1; 16 C. B. N. S. 137; *Garton v. R. R.*, 28 L. J. Ex. 169; *Harmony v. Bingham*, 12 N. Y. 99.

⁹ *Lugard v. Biggs*, 1881, *Grove and Lopes, JJ.* Of this case the *London Law Times* of Dec. 24, 1881, thus speaks: "The plaintiff, who was an

by public officers can in like manner be recovered back.¹ This has been held to be the case with respect to taxes wrongfully assessed and paid under protest to a collector who is authorized by law to levy directly on all persons whose names are on the tax list.² But this does not apply to a payment on a claim whose defects consist simply in informalities.³ Nor can taxes illegally assessed be recovered back if paid voluntarily and without protest.⁴ It was held, also, in Pennsylvania in

officer in the army, had been staying at the defendant's hotel for some days at the time of the late Windsor review. When his bill was presented to him for payment prior to his departure, he complained of the charges, but the defendant refused to alter them. The plaintiff then paid the bill under protest, and subsequently brought an action to recover the amount of the overcharges. At the trial the county court judge found as a fact that the charges were excessive; and he also held, as a matter of law, that the plaintiff must be considered to have known that the defendant could, if he wished, have detained his luggage supposing he had refused to pay the bill. No evidence, however, was offered to show that the plaintiff, at the time of the dispute about the amount of the charges in the bill, had any luggage on the defendant's premises, or that the defendant either detained or made any threat to detain the plaintiff's luggage if he refused to pay those charges. On these facts the case came before justices Grove and Lopes, who held that the plaintiff was entitled to recover the amount of the overcharges sued for by him. This decision we venture to think goes very much further than any decided case has yet gone."

¹ *Supra*, § 149; *Morgan v. Palmer*, 2 B. & C. 729; *Woodgate v. Knatchbull*, 2 T. R. 148; *Dew v. Parsons*, 2 B. & Ald. 563; *Steele v. Williams*, 8 Ex. 625; *Barnes v. Brathwaite*, 2 H. & N.

569; *Railroad Co. v. Commis.*, 98 U. S. 541; *Riley v. Willis*, 5 Whart. 145; *American Steamship Co. v. Young*, 89 Penn. St. 186; *Baker v. Cincinnati*, 11 Oh. St. 534; *Robinson v. Ezzell*, 72 N. C. 231; *supra*, § 149.

² *Supra*, § 149; *Cooley on Taxation*, 368; *Chase v. Dwinal*, 7 Greenl. 134; *Amesbury Man. Co. v. Amesbury*, 17 Mass. 461; *Preston v. Boston*, 12 Pick. 7; *Boston Glass Co. v. Boston*, 4 Met. 181; *Dow v. Sudbury*, 5 Met. 73; *Christ Ch. Hosp. v. Phil. Co.*, 24 Penn. St. 229; *Tenbrook v. Phil.*, 7 Phil. 105; *Harvey v. Olney*, 42 Ill. 336; *Elston v. Chicago*, 40 Ill. 514; *Parcher v. Marathan Co.*, 52 Wis. 388; *Quinnett v. Washington*, 10 Mo. 53; and see cases cited, *supra*, § 149.

³ *Fellows v. School Dist.*, 39 Me. 559.

⁴ *Lackey v. Mercer Co.*, 9 Barr. 318; *Allentown v. Saeger*, 20 Penn. St. 421; *Taylor v. Board*, 31 Penn. St. 73. See 2 Ch. on Con. 11th Am. ed. 943, citing *Ripley v. Gelston*, 9 Johns. 201, and *Clinton v. Strong*, 9 Johns. 370. In *Ripley v. Gelston* the plaintiff was held entitled to recover in this form of action money illegally extorted by the collector of the port of New York as tonnage, a clearance of the vessel being refused until the money was paid. In *Clinton v. Strong*, the plaintiff was held entitled to recover back money which the clerk of the district court illegally required to be paid as a condition of the surrender of plaintiff's property improperly seized, and see *supra*, § 149.

1880, that an extortionate charge by a federal shipping commissioner, by which a seaman is compelled to pay a shipping fee every time he reships on the same vessel, may be recovered back in an action for money had and received.¹ And generally that which is unlawfully extorted can be thus recovered back.² But there can be no recovery back in Pennsylvania of taxes paid under protest when the party paying does not avail himself of his remedy of appeal.³

§ 739. Where A.'s goods are wrongfully seized under an execution against B., A. can recover the proceeds of the sale from the sheriff or other officer levying the execution.⁴ A bankrupt assignee, also, may sue the sheriff for the proceeds of goods sold by the sheriff on an execution levied after an act of bankruptcy.⁵

§ 740. Where money is regularly obtained by legal process, in a court having jurisdiction, against a particular defendant, it cannot be recovered back in a suit by the original defendant against the original plaintiff for money had and received, no matter how erroneous the judgment of the court may have been on the merits. The remedy is to have the judgment, in such case, reversed or set aside; and if this cannot be done, then there is no relief.⁶ The same rule applies to money paid under an award of arbitrators.⁷ It is otherwise, however, when

Proceeds of goods wrongfully sold may be recovered from sheriff.

Money obtained by legal process cannot be thus recovered back.

¹ *American Steamship Co. v. Young*, 89 Penn. St. 186.

² *Supra*, § 149; *Smith v. Bromley*, 2 Doug. 696; *Smith v. Cuff*, 6 M. & S. 160.

³ *Wharton v. Birmingham*, 37 Penn. St. 371.

⁴ *Oughten v. Loppings*, 1 B. & Ad. 241; *supra*, §§ 144 *et seq.*; and see *Kitchen v. Campbell*, 3 Wilson, 304.

⁵ *Leake*, 2d ed. 92; *Balme v. Hutton*, 9 Bing. 471; *Rocke ex parte*, L. R. 6 Ch. 795; *Graham v. Chapman*, 12 C. B. 85; *Mitchell v. Winslow*, 2 Story, 630; *Steele v. Aylesworth*, 18 Conn. 244.

⁶ *Supra*, § 150; Wh. on Ev. § 758 *et*

seq.; *Leake*, 2d ed. 98; *Marriott v. Hampton*, 7 T. R. 269; *Habberton v. Wakefield*, 4 Camp. 58; *De Medina v. Grove*, 10 Q. B. 152; *Belcher v. Mills*, 2 C. M. & R. 150; *Morton v. Chandler*, 7 Greenl. 45; *Strong v. McConnell*, 10 Vt. 232; *Loring v. Mansfield*, 17 Mass. 394; *Nettleton v. Beach*, 107 Mass. 499; *Carter v. Canterbury*, 3 Conn. 461; *Walker v. Ames*, 2 Cow. 428; *Finnel v. Brew*, 81 Penn. St. 362; *Federal Ins. Co. v. Robinson*, 82 Penn. St. 357; *Job v. Collier*, 11 Ohio, 422; *Mitchell v. Sandford*, 11 Ala. 695.

⁷ *Homes v. Aery*, 12 Mass. 134; *Bulkley v. Stewart*, 1 Day, 130.

the court of procedure had no jurisdiction, or where the goods of the party aggrieved were taken in mistake for the goods of another person;¹ and so when money has been collected on a satisfied judgment.² But a party cannot shelter himself from payment of money improperly detained by him by setting up a judgment in which the issue was not directly determined.³ Thus, where an attorney-at-law having received a part payment on a note placed in his hands for collection, after having paid over the amount so received to the creditor, obtained judgment for the whole amount, it was held that the attorney was liable in this form of action to the original debtor for the excess thus collected.⁴—Money paid under a judgment that is finally reversed or annulled can in this way be recovered back,⁵ nor is it necessary that the original payment should have been coerced by execution.⁶—What has been said with regard to money obtained by legal process may be said with regard to threatened legal proceedings. A party who pays even an unfounded claim under threat of *bona fide* legal proceedings, cannot, with the exceptions previously noticed, supposing him to have had a full knowledge of the facts of the case, recover back the money so paid.⁷

§ 741. As we have already seen, money which has been paid for an illegal purpose cannot be recovered back when the purpose has been put in operation.⁸ It is otherwise as to money paid on an executory illegal agreement when the party suing is not implicated in a continuous criminal design.⁹ That (independently of statute) money paid on a gambling debt cannot be recov-

Money paid for illegal purposes cannot be recovered back.

¹ *Supra*, §§ 150, 739; *Snowdon v. Davis*, 1 Taunt. 359; *Valpy v. Manley*, 1 C. B. 594.

² *Wisner v. Bulkley*, 15 Wend. 321.

³ See *Snow v. Prescott*, 12 N. H. 535.

⁴ *Fowler v. Shearer*, 7 Mass. 14.

⁵ *Stevens v. Fitch*, 11 Met. 248; *Sturges v. Allis*, 10 Wend. 354; *Maghee v. Kellogg*, 24 Wend. 32; *Clark v. Pinney*, 6 Cow. 297; *Duncan v. Kirkpatrick*, 13 S. & R. 292; and cases cited 2 Ch. on Cont. 11th Am. ed. 947.

⁶ *Scholey v. Halsey*, 72 N. Y. 578.

⁷ *Supra*, §§ 198, 532–4, 740; *Brown v. McKinally*, 1 Esp. 279; *Lothian v. Henderson*, 3 B. & P. 520; *Graham v. Tate*, 1 M. & S. 610; *Skyring v. Greenwood*, 4 B. & C. 290; *Fellows v. School Dist.*, 39 Me. 559; *Cunningham v. Boston*, 15 Gray, 468; *Wilde v. Baker*, 14 Allen, 349; and other cases cited 2 Ch. on Con. 11th Am. ed. 934.

⁸ *Supra*, §§ 340 *et seq.*

⁹ *Supra*, §§ 354–5; *Kiewert v. Rindskopf*, 46 Wis. 481.

ered back, has been already seen.¹—When there has been a rescission of an illegal contract, and an agreement that the money paid on it should be returned, an action for money had and received lies on this agreement.²—The mere fact that a lender is cognizant of the fact that the money is to be applied to an illegal purpose does not preclude him from recovering back.³

III. MONEY PAID WITHOUT CONSIDERATION.

§ 742. When there has been a total failure of consideration, or where a contract has been abandoned on both sides, or has been rescinded, an action lies for money had and received to recover back any money either paid the other in furtherance of the contract.⁴ Hence when subscriptions are paid into a business adventure, and this adventure is abandoned before the shares are distributed and the risks begun, the party paying in the subscription may recover it back as money had and received.⁵ This has been held to be the case in England with regard to money paid as a deposit on application for shares in a company which is abandoned before an allotment of shares;⁶ and so with respect to money paid for allotments which were held to be *ultra vires*, and which could not therefore be perfected.⁷

Money paid on an in-operative contract may be recovered back.

¹ *Supra*, § 454.

² *Lea v. Cassen*, 61 Ala. 312. As to rescission, see *supra*, §§ 282 *et seq.*

³ *Supra*, § 343; *Williams v. Carr*, 80 N. C. 294.

⁴ *Supra*, §§ 48 *a*, 282, 520; *Payne v. Whale*, 7 East, 274; *Danforth v. Dewey*, 3 N. H. 79; *Cooper v. Newman*, 45 N. H. 339; *Raymond v. Bearnard*, 12 Johns. 275; *Lindsley v. Ferguson*, 49 N. Y. 625; *Feay v. DeCamp*, 15 S. & R. 227; *Thompson v. Gould*, 20 Pick. 134; *Middleport Mills v. Titus*, 35 Oh. St. 253; *Wisner v. Chicago*, 6 Ill. Ap. 254; *Johnson v. Krassin*, 25 Minn. 117; *Garber v. Armentrout*, 32 Grat. 235; *Flinn v. Barber*, 59 Ala. 446; *Sims v. Hutchins*, 8 Sm. & M. 328. In *Gist v. Smith*, 78 Ky. 367, Cofer, J., said: "Money paid upon a contract declared by statute to be void is not

paid under any contract at all; it is paid without consideration, either good or valuable, and may be recovered back unless the transaction is of such a character that the law will not aid either party, which is not the case as to one who pays usurious interest."

⁵ *Kempson v. Saunders*, 4 Bing. 5; see cases cited *supra*, §§ 519 *et seq.*

⁶ *Leake*, 2d ed. 105; *Walstab v. Spottiswoode*, 15 M. & W. 501; *Mowatt v. Londesborough*, 4 E. & B. 1; *Johnson v. Goslett*, 3 C. B. N. S. 569; *supra*, § 520.

⁷ *Alison's case*, L. R. 9 Ch. 24; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 222; *Campbell ex parte*, L. R. 16 Eq. 417, 9 Ch. 1, 12; see *Rudge v. Bowman*, L. R. 3 Q. B. 689; *supra*, § 520. As to mutual subscriptions to charities, see *supra*, §§ 528 *et seq.*

And, generally, where money has been paid by the plaintiff on a contract, and before any benefit accruing to the plaintiff or detriment to the other side, the consideration wholly fails, or the contract becomes wholly inoperative, the plaintiff may recover in this form of action the money advanced by him.¹ So of agreements which are inoperative under the statute of frauds, and which the defendant refuses to perform;² and of other cases of rescission.³—A suit for money had and received lies by a purchaser after rescission of contract of sale to recover money paid as consideration for the purchase.⁴ But where a purchaser pays part of purchase-money, payable in instalments, and then rescinds, he cannot recover back what he has paid if the vendor is ready to perform his part; but if the vendor rescinds, he cannot retain the purchase-money paid.⁵—A purchaser who has made payments on a contract of sale with which the vendor has refused to comply, may recover back from the vendor the money so paid.⁶

§ 743. Whether a deposit paid on a contract for the purchase of real estate can be recovered back on the purchase falling through, depends upon the terms of the contract.⁷ Where the purchaser refuses to comply with the terms assented to by him, he cannot recover back the deposit as such, unless the agreement gives him that right, though he might have an action against the vendor for damages, if the vendor be the party primarily responsible for the failure of the negotiations. The return of the deposit, also, may be excluded by the terms of the contract.⁹ But ordinarily when the sale is not per-

Deposit on real estate may be recovered back on failure to make title.

¹ *Supra*, §§ 48 a, 282, 520; *Dutch v. Warren*, 2 Burr. 1010; *Fuller v. Little*, 7 N. H. 535; *Parish v. Stone*, 14 Pick. 210; *Dill v. Wareham*, 7 Met. 438; *Hill v. Rewee*, 11 Met. 271; *Brown v. Harris*, 2 Gray, 359; *Wheeler v. Board*, 12 Johns. 363.

² *Cobb v. Hall*, 29 Vt. 510; *Thompson v. Gould*, 20 Pick. 134; *Rice v. Peet*, 15 Johns. 503; *Abbott v. Draper*, 4 Denio, 51.

³ *Supra*, §§ 282 *et seq.*, 293.

⁴ 1 Ch. on Cont. 692, 702; *Thornett v. Haines*, 15 M. & W. 367; *Whitcomb v. Denio*, 52 Vt. 382; *Bradford v. Manly*, 13 Mass. 139; *supra*, § 520.

⁵ *Davis v. Hall*, 52 Md. 673.

⁶ *Supra*, §§ 579 *et seq.*; *Jellison v. Jordan*, 68 Me. 373.

⁷ See *supra*, § 520.

⁸ *Barrell ex parte*, L. R. 10 Ch. 512; *Thomas v. Brown*, L. R. 1 Q. B. D. 714; see *Hudson v. Swift*, 20 Johns. 24.

⁹ *Hinton v. Sparks*, L. R. 3 C. P. 161.

fectured through the vendor's fault,¹ or the contract is rescinded by the parties,² the deposit may be recovered back as money had and received.³

§ 744. A party whose name has been forged to a bill, and who pays the bill supposing it to be genuine, may recover back, on discovering the forgery, what he paid, provided there was no such negligence on his part as deprives the party whom he sues of recourse to prior parties.⁴ Money paid in discounting a bill of exchange, the acceptance of which is forged, may also be recovered back, provided there be no estoppel through negligence;⁵ and this has been held even where the defendant did not indorse the bill.⁶ There can also be a recovery in this form of action for money paid for forged railway bonds;⁷ and for money paid for foreign bonds which at the time of the sale were repudiated by the state which it was pretended had issued them.⁸ The same distinction is taken with regard to counterfeit bank notes; a party innocently paying out such being liable to the payee for their value,⁹ though the payee must offer to return the note in a reasonable time, if it be of any value, or else he cannot recover.¹⁰—When the vendor of a

Money paid for worthless securities may be recovered back.

¹ Leake, 2d ed. 107; *Moeser v. Wis-ker*, L. R. 6 C. P. 120; *Simmons v. Heseltine*, 5 C. B. N. S. 554.

² *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 101.

³ See *Pollock*, 476; *Towance v. Bolton*, L. R. 8 Ch. 118; *Jones v. Rimmer*, L. R. 14 Ch. D. 588.

⁴ *Supra*, §§ 509–11, 520; *Leake*, 2d ed. 107; *Benj. on Sales*, 3d Am. ed. §§ 423, 607, 608; *Wilkinson v. Johnson*, 3 B. & C. 428; *Cocks v. Masterman*, 9 B. & C. 902; *Bank of U. S. v. Bank of Ga.*, 10 Wheat. 333; *Thrall v. Newell*, 19 Vt. 202; *Terry v. Bissell*, 26 Conn. 23; *Worthington v. Cowles*, 112 Mass. 30; *Ross v. Terry*, 63 N. Y. 613; *Neff v. Horner*, 63 Penn. St. 327.

⁵ *Jones v. Ryde*, 8 Taunt. 488; *Gurney v. Womsley*, 4 E. & B. 133; *Baxter v. Duren*, 29 Me. 434; *Merriam v.*

Wolcott, 3 Allen, 258; *Wilder v. Cowles*, 100 Mass. 487; *Terry v. Bissell*, 26 Conn. 23; *Aldrich v. Jackson*, 5 R. I. 218; *Ledwich v. McKim*, 53 N. Y. 307; *Chambers v. Bank*, 78 Penn. St. 205.

⁶ *Eagle Bank v. Smith*, 5 Conn. 71; *Canal Bank v. Bank of Albany*, 1 Hill, N. Y. 287.

⁷ *Westropp v. Solomon*, 8 C. B. 345.

⁸ *Young v. Cole*, 3 Bing. N. C. 724; see *supra*, § 509–11.

⁹ *Young v. Adams*, 6 Mass. 182; *Markle v. Hatfield*, 2 Johns. 455; *Mudd v. Reeves*, 2 Har. & J. 368; and cases cited 2 Ch. on Con. 11th Am. ed. 930.

¹⁰ *Ibid.*; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Raymond v. Baer*, 13 S. & R. 318; *Rick v. Kelly*, 30 Penn. St. 527; *Rindall v. Bank*, 7 Leigh, 617; *Simms v. Clark*, 11 Ill. 137.

bond declines to guarantee its genuineness, though he at the time *bona fide* believes it to be genuine, he cannot, on its turning out to be a forgery, be compelled to refund, it appearing that at the time of the sale he put the purchaser on inquiry.¹—It has been held in Massachusetts that a purchaser of forged United States bonds which the government redeemed, may maintain against his vendor an action to recover back the money paid before he has repaid the government or returned the bonds to the vendor.²—Money paid for negotiable paper which is worthless on account of material alterations can also be recovered back;³ and so of money paid for a check which is worthless, provided the holder took prompt measures for the collection of the check, and gave, when necessary, due notice of its dishonor;⁴ and so of money obtained by discount on a forged bill, even though the defendant did not indorse the bill.⁵ It has been held, also, that the vendor of a treasury note, which has been paid but subsequently stolen and put in circulation, is liable to the purchaser, in an action of this class, though the indorsement was “without recourse.”⁶

§ 745. When the consideration has been in part received, but its complete reception is made impossible by *casus*, the price paid cannot be recovered back.⁷ Thus, where engines were to be constructed for a vessel at sea, to be fitted on her arrival at port, and

Money paid cannot be recovered back when contract is prevented

¹ Porter v. Bright, 82 Penn. St. 441.

² Brewster v. Burnett, 125 Mass. 68.

³ Leake, 2d ed. 106; citing Burchfield v. Moore, 3 E. & B. 683; and see Neff v. Horner, 63 Penn. St. 327; and *supra*, §§ 520, 699, *et seq.*

⁴ Leake, 2d ed. 106, citing Turner v. Stones, 1 D. & L. 122; Rogers v. Langford, 1 C. & M. 637; Woodland v. Fear, 7 E. & B. 519; see comments by Blackburn, J., in Kennedy v. Mail Co., L. R. 2 Q. B. 580. In Rogers v. Walsh, 12 Neb. 28, where plaintiff was shown to have bought “county warrants” which turned out to be void, because issued without authority of law, he

was held entitled to recover back the price.

⁵ Eagle Bank v. Smith, 5 Conn. 71; Canal Bank v. Bank of Albany, 1 Hill, N. Y. 87. In Jones v. Ryde, 5 Taunt. 488, above cited, the vendor of a forged navy bill was held bound to return the money received for it. In Gompertz v. Bartlett, 2 E. & B. 849, it appeared that a bill of exchange, which had been sold as foreign, was worthless, being domestic and unstamped; the purchaser was held entitled to recover back the price.

⁶ Frazer v. D’Inwilliers, 2 Barr, 200.

⁷ *Supra*, §§ 314 *et seq.* 520; Benj. on Sales, 3d ed. §§ 336 *et seq.* 339 a.

by *casus*
from com-
pletion.

to be paid for by instalments as the work progressed, and after some progress in the work, and some payments made, the vessel was lost at sea, so that the fitting of the engines was impossible, it was held that the payments made could not be recovered back.¹ And with this is to be considered the "uniform though perhaps anomalous rule, that the money to be paid in advance of freight, must be paid though the goods are before payment lost by perils of the sea; and cannot be recovered back after, if paid before the goods are lost by perils of the sea."²

§ 746. We have already seen that by our law a bare sale of goods, supposing such a case to be put in evidence, is governed by the rule *caveat emptor*, and that in case the vendor turns out to have no title, the purchaser cannot fall back on the vendor for the return of the purchase money. We have also seen that a warranty of title may be implied from the mode of sale, as where a shopkeeper sells goods as his own over his counter.³ In such cases, if the vendor turns out to have no title, and the goods are taken from the purchaser, he may recover from the vendor the price paid by him as money had and received.⁴ The same rule applies when there is a breach of warranty, express or implied, going to the whole consideration.⁵ But it is a question of fact for the jury whether the thing delivered was not what was really intended by both parties; and if so, the sale will not be disturbed, and the parties will be held to their

¹ Anglo-Egypt. Nav. Co. v. Rennie, L. R. 10 C. P. 271. See reference *supra*, §§ 300, 326. But see Schwartz v. Saunders, 46 Ill. 18, and comments, *supra*, §§ 326 *et seq.*

² Brett, J., Allison v. Ins. Co., L. R. 1 Ap. Cas. 226, adopted in Leake, 2d ed. 112. See *supra*, § 520.

³ *Supra*, §§ 230 *et seq.*

⁴ *Supra*, § 520; Leake, 2d ed. 105; Benj. on Sales, 3d Am. ed. §§ 423, 629, 635-641, 893; Eichholz v. Bannister,

17 C. B. N. S. 708; Chapman v. Speller, 14 Q. B. 621; Thurston v. Spratt, 52 Me. 202; Shattuck v. Green, 104 Mass. 42.

⁵ *Supra*, § 520; Giles v. Edwards, 7 T. R. 181; Howe Machine Co. v. Willie, 85 Ill. 333; Harvey v. Harris, 112 Mass. 32; Cutts v. Guild, 57 N. Y. 229; and see cases cited *supra*, § 221. As to effect of warranty see *supra*, §§ 212 *et seq.*, and see also *infra*, §§ 909 *et seq.*

bargain.¹ Thus, where the defendant, a stock broker, bought for the plaintiff certain certificates of stock, which were afterwards repudiated by the company as issued without authority, though they had for some time been in the market, and their character known, it was held that the buyer was bound by his bargain and could not recover the price.²

§ 747. When the failure of consideration is imputable to the plaintiff's own conduct, he cannot recover the money paid.³ Thus, when through the plaintiff's neglect to register a conveyance the title is lost to him, he cannot recover back the price.⁴

When failure of consideration is imputable to plaintiff, he cannot recover.

§ 748. When a consideration is divisible, and the price can be apportioned, then if a distinct divisible portion of the consideration fails, the price paid for such portion may be recovered back.⁵ Thus, as between the parties, a bill of exchange may be apportioned into sums attributable respectively to several considerations, and may be met by the absence of failure of consideration *pro tanto*.⁶ And shrinkage of a thing purchased below its price may be set off in a suit for the purchase money when such shrinkage is imputable to the vendor.⁷ On the other hand, when though the consideration may be formally divisible, yet to divide it would be to destroy its utility, then a partial failure is to be regarded as a total failure;⁸ and

On partial failure of consideration price when entire cannot be recovered back.

¹ Mitchell v. Newhall, 15 M. & W. 308. Co., 64 Ind. 125; and see *supra*, § 190; *infra*, § 899. As to divisibility see

² Lamert v. Heath, 15 M. & W. 487. See *supra*, § 520; *infra*, § 749.

³ *Supra*, §§ 312, 325, 603, 716; Barrrell *ex parte*, L. R. 10 Ch. 512; Thomas v. Brown, L. R. 1 Q. B. D. 714.

⁴ Straton v. Rastall, 2 T. R. 366; Stray v. Russell, 1 E. & E. 888.

⁵ *Supra*, § 511 *et seq.*; Wood v. Benson, 2 C. & J. 94; Lucas v. Goodwin, 3 Bing. N. C. 746; Franklin v. Miller, 4 A. & E. 605; Johnson v. Johnson, 3 B. & P. 162; Devaux v. Conolly, 8 C. B. 640; Earl v. Page, 6 N. H. 477; Hill v. Rewee, 11 Met. 272; Young Man. Co. v. Wakefield, 121 Mass. 91; Dean v. Mason, 4 Conn. 428; Moss v. Printing

⁶ Leake, 2d ed. 630; Darnell v. Williams, 2 Stark. 145; Clark v. Lazarus, 2 M. & G. 167; *supra*, § 511.

⁷ *Infra*, §§ 899, 935; Harrington v. Stratton, 22 Pick. 510; Hammett v. Emerson, 27 Me. 308.

⁸ Johnson v. Johnson, 3 B. & P. 162; Adlard v. Booth, 7 C. & P. 108; Covas v. Bingham, 2 E. & B. 836; see Chanter v. Leese, 5 M. & W. 628. As to divisible duty, see *infra*, §§ 899 *et seq.*; as to payment on *quantum meruit*, see *infra*, §§ 716 *et seq.*; as to destruction by *casus*, see *supra*, § 300.

such, also, is the rule when the failure is in a material matter which was one of the chief inducements to the contract.¹ And as a rule, when the consideration goes to the whole price, and there is a partial failure of the consideration, there cannot be a *pro tanto* recovery of the price.² If the purchaser desires to recover back, the contract must be rescinded *in toto*.³ He cannot hold as to part and rescind as to part.⁴ In cases, on the other hand, in which the consideration is divisible, the purchaser may elect to take what can be delivered to him, and in such case, if the purchase money has been paid, he can recover back the excess, or, if there has been no payment, defend *pro tanto*.⁵ The same distinction is applicable to contracts for labor. If only part of the work has been done, only (supposing the defendant did not prevent completion) a proportional part of the price can be recovered.⁶

§ 749. A party who buys a speculative interest in property cannot, if the speculation disappoints him, recover back what he paid.⁷ This has been held to be the rule with regard to speculative purchases of rights which turned out not to be valid;⁸ or, which failed

A party buying a speculation and losing cannot recover back.

¹ *Roffey v. Shallcross*, 4 Madd. 227; *infra*, §§ 898 *et seq.*; *supra*, § 190.

² *Supra*, § 520; *Leake*, 2d ed. 110; citing *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783; *Harnor v. Groves*, 15 C. B. 667; *Lyon v. Bertram*, 20 How. U. S. 154; *Bliss v. Negus*, 8 Mass. 46; *Nash v. Lull*, 102 Mass. 60; *Colville v. Besley*, 2 Denio, 139. As to part performance, see *supra*, § 580; *infra*, § 899.

³ *Supra*, § 520; *infra*, §§ 899 *et seq.*; *Benj. on Sales*, § 426; *Giles v. Edwards*, 7 T. R. 181; *Whincup v. Hughes*, L. R. 6 C. P. 78; *Harnor v. Groves*, 15 C. B. 667; *Gault v. Brown*, 48 N. H. 183; *Jenness v. Wendell*, 51 N. H. 63; *Clark v. Baker*, 5 Met. 452; *Miner v. Bradley*, 22 Pick. 457; *Morse v. Brackett*, 98 Mass. 205; *S. C.*, 104 Mass. 494; *Mansfield v. Trigg*, 113 Mass. 350; *Bruce v. Pearson*, 3 Johns. 534; *Smith v. Lewis*, 40 Ind. 98; see

Clark v. Gilbert, 26 N. Y. 279; *Hargrave v. Conroy*, 19 N. J. Eq. 281

⁴ *Ibid.*; *Mansfield v. Trigg*, 113 Mass. 350; *Taylor v. Hare*, 1 B. & P. N. R. 260; *Lawes v. Purser*, 6 E. & P. 930. As to divisibility, see §§ 233, 330, 338, 511, 582, 899.

⁵ *Supra*, § 191; *Boone v. Eyre*, 1 H. Bl. 273; *Davis v. Street*, 1 C. & P. 18; *Mavor v. Pyne*, 3 Bing. 285; *Oxendale v. Wetherell*, 9 B. & C. 386; see *supra*, §§ 511, 712 *et seq.*; *infra*, §§ 898 *et seq.*

⁶ *Supra*, §§ 716-7; *Mondel v. Steel*, 8 M. & W. 858; *Parish v. Stone*, 14 Pick. 210. That partial failure of consideration is a defence *pro tanto*, see *Black v. Ridgway*, 131 Mass. 80.

⁷ *Supra*, §§ 516 *et seq.*, 746.

⁸ See *supra*, §§ 519 *et seq.*; *Benj. on Sales*, 3d Am. ed. § 427; *Taylor v. Hare*, 1 B. & P. N. R. 260; *Lamert v. Heath*, 15 M. & W. 487.

to convey exclusive titles.¹ And when a title when bought is known to be tainted, and sells at a low figure, there can be no recovery when the title turns out to be bad.² And when a title as such is sold, the purchaser cannot, if nothing ultimately passes, recover the purchase money paid, but must fall back on the covenants of the deed, if there be such covenants.³

§ 750. Where there is no compulsion, and the party making the payment does not pay to relieve himself or his goods from custody extortionately imposed, a voluntary payment cannot be recovered back, even though it was made to avoid a suit, such suit not amounting to a criminal prosecution.⁴ “If a person with knowledge of all the facts determines to pay money claimed against him without litigation, he is as much bound as if the question had been decided in open court.”⁵ And this holds even though the result is the payment of a claim which could not have been enforced from defect of technical proof; as where the claim paid could not have been sustained from non-compliance with the statute of frauds.⁶

Compromise money paid voluntarily cannot be recovered back.

§ 751. A mistake, not going to legal liability, is no ground for recovering back money whose payment it induces. I may pay from mistaken notions of kindness, or from mistaken notions of policy, but, unless the mistake involves a belief in facts from which arises a legal duty on my part to pay the money, I

Money paid from motives of policy or kindness cannot be recovered

¹ See *supra*, § 520; *Begbie v. Phosphate Co.*, L. R. 1 Q. B. D. 679; *Slaughter v. Gerson*, 13 Wall. 379; *David v. Park*, 103 Mass. 501; *Phipps v. Buckman*, 30 Penn. St. 401; *Coil v. Pittsburgh Coll.*, 40 Penn. St. 439.

² *Lamert v. Heath*, 15 M. & W. 486. As to negligent error, see *supra*, §§ 196, 572. That error in law does not avoid, see *supra*, § 198.

³ *Leake*, 2d ed. 110; *Clare v. Lamb*, L. R. 10 C. P. 334; *Hume v. Pocock*, L. R. 1 Ch. 379; *Manson v. Thacker*, L. R. 7 C. D. 620.

⁴ *Supra*, §§ 150, 198, 533; *Bilbie v.*

Lumley, 2 East, 469; *Barber v. Pott*, 4 H. & N. 759; *Freeman v. Jefferies*, L. R. 4 Ex. 189; *Fay v. Oliver*, 20 Vt. 118; *Reed v. McGrew*, 5 Ohio, 375; *Troy v. Bland*, 58 Ala. 197.

⁵ *Mellish*, L. J., in *Rogers v. Ingham*, L. R. 3 C. D. 358, adopted *Leake*, 2d ed. 100; *supra*, § 523; and see *Hunt v. Silk*, 5 East, 449; *Frambers v. Risk*, 2 Ill. Ap. 499; *supra*, § 740.

⁶ *Thomas v. Brown*, L. R. 1 Q. B. D. 714; see *supra*, §§ 533–5, as to compromise of doubtful claims being a good consideration.

back ; nor
debts of
honor.

cannot recover the money back.¹ "The right to recover money paid under a mistake of fact must have reference to a belief of the existence of a fact, which, if true, would have given the person receiving a right against the person paying the money ; and it never can be applicable to a case where the fact mistaken is a fact which would merely have made it desirable for the person paying it to pay to the person receiving it."² The action, also, "does not lie for money paid by the plaintiff which was claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law ; as in payment of a debt barred by the statute of limitations or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play ; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies," so it is added in conformity with the views already expressed, "for money paid by mistake ; or upon a consideration which happens to fail ; or for money got through imposition, express or implied ; or extortion or oppression ; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."³ Hence money paid voluntarily to discharge a debt barred by the statute of limitations is not the basis of a suit for contribution ;⁴ nor is money paid in discharge of an obligation not technically sustainable at law.⁵

¹ *Supra*, §§ 164, 496 ; *Aiken v. Short*, 1 H. & N. 210 ; *Wilson v. Thornbury*, L. R. 10 Ch. 239 ; see *Clare v. Lamb*, L. R. 10 C. P. 334 ; *Livermore v. Peru*, 55 Me. 469 ; *Real Est. Sav. Inst. v. Linder*, 74 Penn. St. 371.

² *Bramwell, B., Aiken v. Short*, 1 H. & N. 210 ; see *supra*, §§ 164, 496.

³ *Lord Mansfield, C. J., Moses v. Macferlan*, 2 Burr. 1005. That a promise to pay debts of the character expressed in the text binds, see *supra*,

§ 513. That the money paid under a claim of right, though not the subject of suit, cannot be recovered back, see *Kennedy v. Hughey*, 3 Watts, 265 ; *Keener v. Bank*, 2 Barr, 237 ; *Natcher v. Natcher*, 47 Penn. St. 496.

⁴ *Wheatfield v. Brush Valley*, 25 Penn. St. 112 ; *supra*, § 513.

⁵ *Speise v. McCoy*, 6 W. & S. 485 ; see *Keener v. Bank*, 2 Barr, 237 ; *Natcher v. Natcher*, 47 Penn. St. 496.

IV. MONEY PAID IN MISTAKE.

§ 752. We have already seen that money paid under mistake of fact may be recovered back.¹ "Where money," said Lord Mansfield, "is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again."² This has been held to be the case with money paid under mistaken weight or measurement, or in miscalculation of price,³ and with money paid by a tenant of land to the wrong party claiming as landlord.⁴ Thus, the accommodation maker of a note which has been materially altered without his knowledge, and who paid in ignorance of the alteration, may recover back the money so paid.⁵ The purchaser, also, to take another illustration, of milk bought by the can, who pays more money than is due by reason of the cans being deficient in size, can recover back from the vendor his excess of payment.⁶ But the mistake should be established as a prerequisite to recovery,⁷ and, after any considerable lapse of time, should be established by clear and strong proof.⁸ And the obligation of a party ignorant of the mistake to repay money voluntarily paid him in mistake, arises only on notification of the mistake.⁹—Even when a mistake has been fraudulently induced, the right to

Money paid in mistake of fact may be recovered back.

¹ *Supra*, §§ 197, 521.

² *Bize v. Dickason*, 1 T. R. 285. See to same effect *Kelly v. Solari*, 9 M. & W. 58; *Norton v. Marden*, 15 Me. 45; *Pearson v. Lord*, 6 Mass. 81; *Bond v. Hayes*, 12 Mass. 36; *Talbot v. Nat. Bk.*, 129 Mass. 67; *Stanley Rule Co. v. Bailey*, 45 Conn. 464; *Burr v. Veeder*, 3 Wend. 412; *Sprague v. Birdsall*, 2 Cow. 419; *Mayor of N. Y. v. Erben*, 38 N. Y. 305; *Higgins v. Mendenhall*, 51 Iowa, 135; *Glenn v. Shannon*, 12 S. C. 570; *Wilson v. Sergeant*, 12 Ala. 778. See *Rice v. Barnard*, 127 Mass. 241.

³ *Supra*, §§ 190, 520 *et seq.*; *Benj. on Sales*, 3d Am. ed. § 415; *Cox v. Prentice*, 3 M. & S. 344; *Newall v. Tomlinson*, L. R. 6 C. P. 405; *Lyon v. Bertram*, 20 How. (U. S.) 149; *Holtz v.*

Schmidt, 59 N. Y. 253; *Wooster v. Sage*, 67 N. Y. 67. See *Garland v. Salem Bank*, 9 Mass. 408.

⁴ *Newsome v. Graham*, 10 B. & C. 234; *Barber v. Brown*, 1 C. B. N. S. 121.

⁵ *Fraker v. Little*, 24 Kans. 598. See as to alterations *supra*, § 695.

⁶ *Devine v. Edwards*, 87 Ill. 177.

⁷ *Union Savings Ass. v. Kehlror*, 7 Mo. Ap. 158.

⁸ *Thompson v. Fullinwider*, 5 Ill. Ap. 551; *supra*, § 289.

⁹ *Southwick v. Bank*, 84 N. Y. 420; citing *Freeman v. Jefferies*, L. R. 4 Exch. 189; *Stacy v. Graham*, 14 N. Y. 492; *Snyder v. Williams*, 37 N. Y. 109; *supra*, §§ 284 *et seq.*

recover back is lost where the party paying the money, after a discovery of all the facts, acquiesces in the disbursement of the money in pursuance of the contract by the other contracting party.¹ But mere lapse of time does not preclude recovery; and where there has been no laches imputable to the plaintiff, the fact that the defendant is prejudiced by the mistake is no defence.²—The mistake must have been as to an existing fact.³

§ 753. That the mistake of fact was negligently made does not necessarily preclude the party from recovering.⁴

Mere negligence does not preclude party from recovering.

A party who omits to avail himself of the means of correcting his mistake, although these means were at hand, is not thereby prevented from setting up this

mistake in a suit to recover back money paid under its influence.⁵ Even though notice had been previously given him of the true state of facts, yet if he had forgotten these facts he may nevertheless recover; as where it was held that a life insurance company could recover back money paid by them on a lapsed policy, though their books showed they had notice of the lapse.⁶—That where a contract has been negligently induced a different conclusion may be reached, and the party negligently inducing another to contract with him may be estopped, we have already seen.⁷ And, when the payment is imputable to the plaintiff's recklessness, the plaintiff has no case.⁸

¹ *People v. Stephens*, 71 N. Y. 527; *Richardson*, 51 Tex. 1. As to liability see *supra*, § 289. for negligence, see *infra*, § 1043.

² *Durrant v. Comm.*, L. R. 6 Q. B. D. 234. See Mr. Moak's note, 29 Eng. R. 590, citing *Young v. Lehman*, 63 Ala. 519; *Alston v. Richardson*, 51 Tex. 1. ⁵ *Ferson v. Sanger*, 1 Wood. & M. 138; *Wheadon v. Olds*, 20 Wend. 174; *Fraker v. Little*, 24 Kan. 598; *Lamb v. Harris*, 8 Ga. 546. See *supra*, §§ 196, 245, 289, 572.

³ *Supra*, §§ 197, 521; *Southwick v. Bank*, 84 N. Y. 433. ⁶ *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477; *Mayer v. New York*, 63 N. Y. 455. See *supra*, §§ 196, 245, 289, 572.

⁴ *Supra*, §§ 196, 245, 289, 572; *Leake*, 2d ed. 102; *Bell v. Gardiner*, 4 M. & G. 11; *Townsend v. Crowdry*, 8 C. B. N. S. 477; *Stanley Rule Co. v. Bailey*, 45 Conn. 464; *Waite v. Leggett*, 8 Cow. 195; *Boyer v. Park*, 2 Denio, 107; *Devine v. Edwards*, 87 Ill. 177; *Rutherford v. McIvor*, 21 Ala. 750; *Alston v.*

⁷ *Supra*, §§ 196, 202 a, 226; *Norton v. Marden*, 15 Me. 45. See *Kingston Bank v. Eltinge*, 40 N. Y. 391; *Rutherford v. McIvor*, 21 Ala. 750.

⁸ *Wood v. Boylston Bank*, 129 Mass. 358; *supra*, §§ 196, 245, 289, 572.

§ 754. Money paid voluntarily cannot be recovered back when the mistake is purely one of law. It is on this ground that the court placed an early ruling that though an insurance was actually void in law in consequence of a material misrepresentation by the insured, yet money paid by the insurer to the insured on the loss could not be recovered back since the mistake which led to the payment was exclusively one of law.¹ Yet when the question is of the application of law to a complex state of facts, there is no more reason why relief should not be given to a party paying money by mistake, than there is why relief should not be given to a party making a contract by mistake;² supposing there is nothing to equitably estop the plaintiff from recovery after such a payment by mistake.³ But where the mistake is purely one of law, the party paying cannot recover back. Thus it has been held in Massachusetts that although under the statute there in force no greater rate of interest than six per cent. can be received in any action unless on an agreement in writing, yet a party who has paid interest on an oral agreement in excess of six per cent. cannot recover back the money so paid.⁴

Money paid in mistake of law cannot be recovered back.

§ 755. It is no defence in a suit by a third party against an agent to whom money has been paid by mistake, that the money has been paid over to the principal, When money

¹ *Bilbie v. Lumley*, 2 East, 469; *Leake*, 2d ed. 104, citing also *Lowry v. Bourdieu*, 2 Doug. 468; *Brisbane v. Dacres*, 5 Taunt. 143; *Lamborn v. County Com.*, 97 U. S. 181; *Norton v. Marden*, 15 Me. 45; *Fellows v. District*, 39 Me. 559; *Benson v. Munroe*, 7 Cush. 125; *Wilde v. Baker*, 14 Allen, 349; *Northrop v. Graves*, 19 Conn. 548; *Clarke v. Dutcher*, 9 Cow. 674; *Real Est. Inst. v. Linder*, 74 Penn. St. 371; and cases cited *supra*, §§ 198-9.

² See *supra*, § 199; *Hall v. Jackson Co.*, 5 Ill. App. 609.

³ *James ex parte*, L. R. 9 Ch. 609. As to estoppel, see *supra*, §§ 196, 202 a. "There are some cases in which this

court has not adhered strictly to the rule that a mistake in law is incapable of being remedied; but relief has never been given in the case of a simple money demand by one person against another, there being between those persons no fiduciary relation, and *no equity to supervene by reason of the conduct of either.*" *James, L. J., Rogers v. Ingham*, L. R. 3 C. D. 351. The last is a very broad exception, at least as broad as the rule already stated, that mistake in the subsumption of facts under a legal principle is a mistake of fact and not of law; *supra*, § 199.

⁴ *Marvin v. Mandell*, 125 Mass. 562.

paid by
third per-
son to
agent can
be recov-
ered back.

supposing that the agent at the time of so paying over had notice of the third party's claim.¹ It is otherwise, however, when before notice the money has been paid over by the agent to his principal, or allowed for in the agent's accounts with the principal.²

¹ *Elliott v. Swartwood*, 10 Pet. 137; *Garland v. Bank*, 9 Mass. 408; *Frye v. Lockwood*, 4 Cow. 454; *Mowatt v. McClellan*, 1 Wend. 173; *Wharton v. Hudson*, 3 Rawle, 390, and other cases cited 2 Ch. on Cont. 11th Am. ed. 911. ² Wh. on Ag. § 576; *Holland v. Russell*, 1 B. & S. 424; *Cox v. Prentice*, 3 M. & S. 344; *Peto v. Blades*, 5 Taunt. 657; *Carew v. Otis*, 1 Johns. 418; *La Farge v. Kneeland*, 7 Cow. 456; *Granger v. Hathaway*, 17 Mich. 500.

CHAPTER XXIV.

MONEY PAID TO ANOTHER'S USE.

Voluntary payment to another's use cannot be recovered back, but otherwise as to payment at request, § 756.	Party paying maritime liens may claim contribution, § 764.
Request may be inferred from circumstances, § 757.	Co-debtors and co-sureties paying common debt entitled to contribution, § 765.
Money must have been actually paid, § 758.	Contribution limited by contract between parties, § 766.
When A. is required by law to make payment for B. he may recover from B., § 759.	Same principle extended to members of associations, § 767.
So of party whose goods are attached to pay another's debt, § 760.	Surety entitled to contribution from principal, § 768.
Not necessary that execution should issue, § 761.	And to share securities with co-surety, § 769.
Person whose goods are distrained on another's premises may recover from such other, § 762.	Insurer may recover from person causing loss, § 770.
No recovery when the party paying acted negligently or officiously, § 763.	Money contributed to illegal enterprise cannot be recovered back, nor can tort-feasor recover contribution, § 771.

§ 756. A PARTY in whose behalf a voluntary payment is made by another is not bound in law to reimburse the party making the payment. Whether I will make a particular investment; whether I will subscribe to a particular charity; whether I will relieve particular goods belonging to me from a burden to which they are exposed; whether I will reinsure my property, whose insurance has expired: these, and similar questions are for me to decide. I may have my own reasons for not making a payment which would apparently be advantageous to me;¹ at all events, if parties are entitled to recover money they lay out for the apparent relief of others, or for the apparent credit of others, the lines which

Voluntary payment for another cannot be recovered back, but otherwise as to payment at request.

¹ See *infra*, § 784; *supra*, § 506.

protect business from the incursions of strangers would be broken down. When such money is paid by the request of the party relieved or credited, or when it is paid under compulsion, then, as we will see, it can be recovered back; but it cannot be recovered back when made voluntarily without request.¹ Hence, where a drawer of a bill of exchange made for the accommodation of the acceptor, after being discharged from liability by the holder neglecting to notify him of dishonor, paid the bill in part, it was held that he could not recover what he paid from the acceptor, though the latter was *pro tanto* relieved, the reason being that the payment was voluntary;² and so, it seems, of a payment made by a surety for a principal on a contract which could not have been enforced as not valid under the statute of frauds.³ For the same reason payments made by a physician on account of a pauper patient cannot be recovered from the parish authorities unless they authorize the expense.⁴ A volunteer, also, who pays out money for the support of a lunatic, without any contract, express or implied, cannot recover the money from the lunatic's committee.⁵ It is otherwise as to money paid by the plaintiff at the defendant's request, either express or implied. In such cases the defendant is bound to refund.⁶ Hence where A. at

¹ *Infra*, § 763; 1 Wms. Saund. 264, n. (1); Leake, 2d ed. 85; *Stokes v. Lewis*, 1 T. R. 20; *Child v. Morley*, 8 T. R. 610; *Durnford v. Messiter*, 5 M. & S. 446; *Johnson v. Steam Packet Co.*, L. R. 3 C. P. 43; *Bates v. Townley*, 2 Ex. 152; *England v. Marsden*, L. R. 1 C. P. 529; see *Dearborn v. Bowman*, 3 Met. Mass. 155; *Richardson v. Williams*, 49 Me. 558; *Day v. Holmes*, 103 Mass. 306; *Bigelow v. Davis*, 16 Barb. 561; *Springer v. Springer*, 43 Penn. St. 518; *Davis v. Calloway*, 30 Ind. 112.

² *Sleigh v. Sleigh*, 5 Ex. 514.

³ Leake, 2d ed. 85; citing *Pawle v. Gunn*, 4 Bing. N. C. 445; *Indian. R. R. v. O'Reilly*, 38 Ind. 140.

⁴ *Wing v. Mill*, 1 B. & Ald. 104; see *Lamb v. Bunce*, 4 M. & S. 275.

⁵ *Hehn v. Hehn*, 23 Penn. St. 415.

⁶ 1 Saund. 264, note 1; *Power v. Butcher*, 10 B. & C. 346; *Grissell v. Robinson*, 3 Bing. N. C. 15; *Driver v. Burton*, 17 Q. B. 989; *Benson v. Thompson*, 27 Me. 471; *Willis v. Hobson*, 37 Me. 403; *Rumney v. Ellsworth*, 4 N. H. 138; *Wilson v. George*, 10 N. H. 445; *Beach v. Vandenburg*, 10 Johns. 361; *Rensselaer Factory v. Reid*, 5 Cow. 603; *Little v. Gibbs*, 1 South. 213; *Hatton v. Robinson*, 4 Blackf. 479; *Taylor v. Colten*, 6 Ired. 69; *Wharton v. Franks*, 9 Porter, 232. That the request must be averred, see *Stokes v. Lewis*, 1 T. R. 20; *Exall v. Partridge*, 8 T. R. 308; *Brittain v. Lloyd*, 14 M. & W. 762; *Packard v. Lienow*, 12 Mass. 11; *Hassinger v. Solmes*, 5 S. & R. 4.

B.'s request becomes responsible for a debt of B. to C., and is compelled to pay such debt, A. may sue B. for the money so paid.¹—The Roman law, which subjects a party to liability for payment made in his absence in relief of his estate, which would otherwise be sacrificed, prevails throughout continental Europe;² and it is accepted in Louisiana, though with some qualification.³ Our own law is unquestionably inconsistent in rejecting the Roman doctrine on the ground that no man should have a creditor forced on him without his consent, and yet permitting a stranger to purchase claims against any one against whom there may be claims in the market. The merchantability of debts, however, has now become essential to business, and to this the old doctrine of the common law has to yield. It has yielded, however, only so far as the exigencies of commerce require; and it should yield no further. Under the old Roman system, where, from the insulation of business men, ruin would often follow unless aid by a *negotiorum gestor* could be secured, it was natural that it should be held that the *negotiorum gestor* should be entitled to be reimbursed. But in our times, each day adds to the facilities by which the owner of property can be advised of disaster to it and communicate his instructions; while each day the increasing complications of business add to the embarrassments which would be produced were volunteers to be permitted to step in and arrange whatever they might consider out of place. And though, undoubtedly, we have been obliged to relax the old rule so far as to permit the assignment of debts, yet, with this limitation, the increasing complexity of our civilization adds to the arguments against permitting parties to place themselves in the position of creditors to others as to debts such others do not choose to incur. If I incur a debt to A., I now do it, it is true, with the understanding that A. may assign this debt to B.—But the fact that I incur a debt of a particular character to A. is no reason why C., without my knowl-

¹ *Hassinger v. Solmes*, 5 S. & R. 4; *Benj. on Sales*, 3d Am. ed. § 62; *Wh. on Ag.* § 356.

² See *Windscheid*, tit. *Neg. Gest.*; ³ *White v. Jones*, 14 La. An. 681; *Erwin's Succession*, 16 La. An. 132.

edge, should subject me to a debt which I have never authorized at all.

§ 757. While, however, the principle is settled that the mere payment of money by A. on behalf of B., unless requested by B., does not give A. a claim against B., yet it is not necessary, in order to prove a request, that an express application from B. to A. should be shown. We may infer a request from the prior business relations of the parties; from the fact that B. was aware at the time of the payment and encouraged it; from the fact that the payment was in pursuance of a plan previously approved by him; from his acceptance of its fruits; in fine, from any circumstances from which we may hold it probable that A. paid the money at B.'s instigation, or, at all events, with B.'s approval.¹ The most familiar illustration of the principle before us is to be found in the payments by general agents advancing money in the ordinary course of business for their principals, which advances, when within the range of the agent's duties, the principal is bound to refund.² The same rule applies to payments made by one party to an adventure for its promotion, which payments were in furtherance of the common plan, and which he is entitled to recover from his co-adventurers.³ Where, also, certain lands were bought in at an auction sale, and the duties imposed by government were paid by the auctioneer, he was held entitled to use this form of action to recover the money back from the party whose property was relieved.⁴ A trustee, also, under a will, who pays a legacy duty upon an annuity, may recover, in the same way, the money paid from the legatee.⁵ So, also, where the London custom in negotiating and perfecting a lease, was that while the lessor's solicitor should draw the papers, the expense

Request
may be in-
ferred from
circum-
stances.

¹ *Sutton v. Tatham*, 10 Ad. & El. 27; *Pollock v. Stables*, 12 Q. B. 765; *Pawle Foster v. Ley*, 2 Bing. N. C. 269; *v. Gunn*, 6 Scott, 286; 4 Bing. N. C. 445; *Brown v. Hodgson*, 4 Taunt. 189; *Knox v. Martin*, 8 N. H. 154; *Seymour v. Marlboro*, 40 Vt. 171; *Moreland v. Davidson*, 71 Penn. St. 371; *James v. O'Driscoll*, 2 Bay, 101.

² *Westropp v. Solomon*, 8 C. B. 345;

³ *Bailey v. Haines*, 13 Q. B. 815.

⁴ *Brittain v. Lloyd*, 14 M. & W. 762.

⁵ *Hales v. Freeman*, 1 B. & B. 391.

was to be paid by the lessee, it was held that such expenses, having been prepaid by the lessor, could be recovered back in this form of action from the lessee.¹ The furthest limit that has been reached in this direction is in respect to services rendered in the interment of the dead. It has been held that a party who voluntarily incurs expenses in burying another, can recover the expenses of the funeral from that other person's estate;² and that a husband, absent at the time of his wife's death, is liable to a party who supplied the funds for her burial in a way suitable to the husband's condition.³ In these cases a general agency to friends may be inferred.

§ 758. It is necessary, to sustain the suit, that money or its equivalent should have been paid by the plaintiffs to the defendant's use.⁴ Hence, it has been argued that the mere fact that the plaintiff's goods had been seized under a distress by the defendant's landlord on account of rent due by the defendant, does not by itself sustain a suit for money paid,⁵ though it would be otherwise if the goods of the plaintiff had been sold under an execution for a debt due by the defendant, and the proceeds actually applied to the payment of such debt.⁶ Merely giving a bond by the plaintiff, as surety, for the defendant's debt, is not paying money;⁷ though it has been ruled that giving negotiable paper is such payment.⁸ And when goods are paid as an equivalent to cash, they are to be so treated in this connection.⁹ It has been held in several cases that execution on a surety's property, on judg-

Money
must have
been paid.

¹ *Grissell v. Robinson*, 3 Scott, 329; also *New Salem v. Wendell*, 2 Pick. 341; *Forsyth v. Gamson*, 5 Wend. 558; *Sears v. Giddey*, 41 Mich. 90.
² *Supra*, §§ 756 *et seq.*
³ See *Brittain v. Lloyd*, 14 M. & W. 773; *supra*, §§ 756-7; *infra*, §§ 759, 762.
⁴ *Rodgers v. Maw*, 15 M. & W. 444.
⁵ *Taylor v. Higgins*, 3 East, 169; *Power v. Butcher*, 10 B. & C. 329; *Morrison v. Berkey*, 7 S. & R. 238; *Pursel v. Ellis*, 5 W. & S. 525.

⁶ *Rogers v. Price*, 3 Y. & Jer. 28.

⁷ *Ambrose v. Kerrison*, 10 C. B. 776; *Bradshaw v. Beard*, 12 C. B. N. S. 344; 2 Ch. on Cont. 11th Am. ed. 889, citing *Pearson v. Parker*, 3 N. H. 366; *Chandler v. Brainard*, 14 Pick. 285; *Doolittle v. Dwight*, 2 Met. 561.

⁸ *Garnsey v. Allen*, 27 Me. 366.

ments obtained against him for the principal's debt, enables him, on money being paid, to sustain an action for money paid against the principal.¹ If the money is paid, as will appear hereafter more fully, it is not necessary that an execution should have issued compelling the payment, if the case were one in which an attachment could at any time have issued.²

§ 759. We have already noticed cases in which, from acceptance of service, or from acceptance of goods, supplied at the request, express or implied, of the party accepting, a contract to pay for such services or goods is assumed. We have now to recur to cases in which one party is assumed to have contracted to repay money paid for him by another, not because he requested such payment, but because the party paying was in the eye of the law authorized to act for the party for whom the payment was made.³ Thus the guardians of a union workhouse have been held entitled to recover the expenses of removing nuisances from the vestry whose duty it was to remove the nuisances;⁴ an indorser, who, when sued by a holder of a bill, pays the holder, is entitled to recover from the acceptor;⁵ a surety who pays his principal's debt is entitled to recover from his principal, and one co-surety is entitled to recover from the other;⁶ a carrier who has by mistake delivered goods to a wrong person, and who has been compelled to pay the value of the goods to the owner, is entitled to recover these goods from the person who thus wrongfully appropriated them;⁷ an auctioneer, as in a case already noticed, who pays auction duty, is entitled to recover the amount from the parties in whose relief it was paid.⁸—Where, also, a mortgagee

¹ Lord *v.* Staples, 23 N. H. 448; Randall *v.* Rich, 11 Mass. 494; Bonney *v.* Seely, 2 Wend. 481; Morrison *v.* Berkeley, 7 S. & R. 238; and cases 2 Ch. on Cont. 11th Am. ed. 880. *Infra*, § 761.

² *Infra*, § 761.

³ Child *v.* Morley, 8 T. R. 610; Jenkins *v.* Tucker, 1 H. Bl. 90; Kenan *v.* Holloway, 16 Ala. 53.

⁴ Halborn Union *v.* St. Leonard's, L. R. 2 Q. B. D. 145.

⁵ Pownal *v.* Ferrand, 6 B. & C. 439;

Jefferys *v.* Gurr, 2 B. & Ad. 833; for other cases of liability on negotiable paper see Bate *v.* Payne, 13 Q. B. 900; Hawley *v.* Beverly, 6 M. & G. 221; Mallalieu *v.* Hodgson, 16 Q. B. 689; Bleeden *v.* Charles, 7 Bing. 246; Horback *v.* Reeside, 6 Whart. 47.

⁶ Pitt *v.* Purssord, 8 M. & W. 538.

⁷ Brown *v.* Hodgson, 4 Taunt. 189.

⁸ Brittain *v.* Lloyd, 14 M. & W. 762.

"The law is, that a party by voluntarily paying the debt of another does

bought at sheriff's sale the mortgaged property, and then, to protect the property from further execution, paid the taxes which had accrued on it while the mortgagor was in possession, it was held that he was entitled to recover the amount thus paid from the party who should primarily have paid it.¹ "It is a clearly established principle," said Trunkey, J., "that no assumpsit will be raised by the mere voluntary payment of the debt of another person; from such act a request and promise are not implied. Another principle is, that when the plaintiff is compelled to pay the defendant's debt, in consequence of his omission to do so, the law infers that he requested the plaintiff to make the payment for him. There was a strict liability on the part of the defendant to pay the taxes. And it was his duty. Prompt payment of taxes is to the public advantage. Attempts by him who owes and ought to pay them to evade payment, or shift the burden upon another, ought not to be encouraged; the defendant has shown nothing which in good conscience should relieve him. He wittingly became owner and held possession of the lots subject to the mortgages, and had as little right to create or suffer an incumbrance which would take preference of the mortgage, as the mortgagor would have had had he remained owner and in possession. The mortgagee was compelled to pay the taxes in relief of the land purchased for his debt, the land not raising a sufficient fund to pay both liens. We are of opinion that this is a clear case for the application of the principle that he who is compelled to pay another's debt, because of his omission to do so, may recover on the ground that the law infers that the debtor requested such payment." And it has been held that one of two tenants in common who pays the mortgage for both, acquires a lien on his co-tenant's share of the mortgaged property which he holds in security for the

not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay to reimburse me. That principle was fully established in

the case of *Exall v. Partridge*, 8 T. R. 308." Bayley, J., *Pownal v. Ferrand*, 6 B. & C. 439; see *Davis v. Humphreys*, 6 M. & W. 153.

¹ *Hogg v. Longstreth*, 97 Penn. St. 255.

amount paid in excess of his share of the mortgage debt.¹ And, as a general rule, where a vendor of real estate is compelled on a personal suit to pay a mortgage which the vendee agreed to discharge, the vendor may sue the vendee for reimbursement.² But when a vendee undertakes to pay the amount of an incumbrance, and expressly covenants to pay the same, which he is compelled to do, he cannot recover from a remote purchaser, though the incumbrance is recited in the deed under which the latter takes.³

§ 760. A party whose goods are attached in another's hands, or which, when in such other person's hands, are subjected to a lien for a debt of such other person, and who pays the debt of such other person in order to release the goods, is entitled on the same reason to recover the money so paid from the person to ease whom it was paid.⁴

So of party whose goods are attached to pay another's debt.

§ 761. It is not necessary that the payment should be actually made under an attachment; it is enough if it is a payment which an attachment would compel.⁵ A debt enforceable only in equity stands in this respect on the same footing as a debt enforceable in law.

“If the plaintiff had paid the money either under the fear of process of a court of equity or of a court of law, he could have recovered it from the defendant.”⁶ And as a general rule, where a party is in a position in which he is open to compulsion by law to pay a particular sum, it is not necessary for him to wait for an execution, or an attachment, to enable him to sue in this form of action.⁷ Even where an adminis-

¹ *Sargent v. McFarland*, 8 Pick. 500; see *Roche v. Savings Bank*, 128 Mass. 10.

² *Kearney v. Tanner*, 17 S. & R. 94; *Trevor v. Perkins*, 5 Whart. 244.

³ *Keim v. Robeson*, 23 Penn. St. 456.

⁴ *Leake*, 2d ed. 82, citing *Johnson v. Packet Co.*, L. R. 3 C. P. 45; *Sapsford v. Fletcher*, 4 T. R. 511; *Ticonic Bk. v. Smiley*, 27 Me. 225; and see *Sargent v. Currier*, 49 N. H. 310; *Hale v. Huse*, 10 Gray, 99; *Butler v. Wright*, 6 Wend. 284.

⁵ *Pitt v. Purssord*, 8 M. & W. 538; *Spencer v. Parry*, 3 Ad. & El. 338; *Brown v. Hodgson*, 4 Taunt. 189; *Shaw v. Loud*, 12 Mass. 447; *Firth v. Sprague*, 14 Mass. 455; *Randolph v. Randolph*, 3 Rand. Va. 490. That execution may be treated as tantamount to payment, see *supra*, § 758.

⁶ *Hutton v. Eyre*, 6 Taunt. 289.

⁷ *Pitt v. Purssord*, 8 M. & W. 538; *Sleigh v. Sleigh*, 5 Exch. 514; *Goodall v. Wentworth*, 20 Me. 322; *Mauri v. Hefferman*, 13 Johns. 58.

trator of a surety paid a debt which was barred under the statute of limitation giving special protection to administrators, but which was not barred, so far as concerned the relations of the principal to the creditor, it was held that the administrator could recover the amount paid from the principal.¹ But payment must not have been merely voluntarily made.² And a surety who voluntarily pays a debt from which he is discharged by law, cannot maintain a suit against the principal for reimbursement.³

§ 762. A party to whom no negligence is imputable,⁴ whose goods have been seized under a distress against another person in whose premises they may happen to have been, may by stress of the rule before us, recover from the latter person the value of the goods; or, if he pays the rent in order to release the goods, may recover the amount so paid.⁵ And an under lessee or lodger who is obliged, by compulsion of distress on his goods, to pay rent to the superior landlord, is entitled to deduct the amount so paid when sued by his immediate landlord. "When the tenant is compelled in order to protect himself to make payments which ought, as between himself and his landlord, to have been made by the latter, *he is considered as having been authorized by the landlord so to apply his rent due or accruing due.* All such payments, if incapable of being treated as actual payments of rent, would certainly give the tenant a right of action against his landlord as for money paid to his use; and so would, in an action of debt for the rent, form a legitimate subject of set-off."⁶ The same principle enables a tenant to recover from his landlord sums paid under compulsion for drainage;⁷ and for road repairs.⁸ But technically, as we have seen, there can be no recovery for money paid without proof of the payment of money or

Persons whose goods are distrained on another's premises may recover from such other.

¹ Shaw v. Loud, 12 Mass. 447.

529; see Sapsford v. Fletcher, 4 T. R.

² *Supra*, §§ 758 et seq.; West Chester v. Apple, 35 Penn. St. 284.

511.

³ Kennedy v. Carpenter, 2 Whart. 344.

⁶ Per cur. Graham v. Allsopp, 3 Ex. 198; Jones v. Morris, 3 Ex. 742; Johnson v. Skafte, L. R. 4 Q. B. 705; cited in Leake, 2d ed. 83.

⁴ See *infra*, § 763.

⁵ Exall v. Partridge, 8 T. R. 308; England v. Marsden, L. R. 1 C. P.

⁷ Dawson v. Liston, 5 B. & Ald. 521.

⁸ Baker v. Greenhill, 3 Q. B. 148.

its equivalent.¹ And a plaintiff who negligently left his goods on the defendant's premises, without any engagement with the defendant, cannot recover money paid by him to relieve such goods from a distress for rent due by the defendant.² Where, also, the plaintiff and the defendant being under-lessees at distinct rents of separate parts of the premises, the plaintiff, under threat of distress, paid the whole rent, it was held that he could not recover a proportion of the payment from the defendant.³

§ 763. Where one party pays money for another through his own negligence, he cannot recover from the party on whose behalf it is paid.⁴ Hence, as we have just seen, a party who negligently leaves his goods in another's house, where they are distrained, cannot recover from the owner of the house the amount paid to release the goods.⁵ The law under such circumstances will not imply the request.⁶ And where W. negligently delivers to A. goods meant for B., W., having paid the value of the goods to B., cannot recover the amount of the payment from A. without proving conversion by A.⁷ Where, also, the plaintiff, one of two joint prize agents, was, in part through his own want of caution, imposed upon by a person who falsely pretended to be a seaman entitled to prize-money, and was afterwards compelled to pay the amount to the real claimant, it was held that the plaintiff could not recover a moiety of the payment from his associate agent.⁸ A banker, also, cannot recover from a party whose cheque has

¹ *Supra*, § 758.

² *England v. Marsden*, L. R. 1 C. P. 529.

³ *Bates v. Founley*, 2 Exch. 152.

⁴ *Supra*, § 756; *Griffinhoofe v. Danbuz*, 5 E. & B. 746; *England v. Marsden*, L. R. 1 C. P. 529; *Sleigh v. Sleigh*, 3 Exch. 514; see also *Hunter v. Hunt*, 1 C. B. 300; *Willis v. Hobson*, 37 Me. 403; *Rumney v. Ellsworth*, 4 N. H. 138; *Fisher v. Kinaston*, 18 Vt. 489; *Gleason v. Dyke*, 22 Pick.

393; *Doty v. Wilson*, 14 Johns. 378; *Rensselaer Glass Fact. v. Reid*, 5 Cow. 603; *Taylor v. Baldwin*, 10 Barb. 626; *Mayor, etc., v. Hughes*, 1 Gill & J. 497; *Taylor v. Cotten*, 6 Ired. 69; *Lewis v. Lewis*, 3 Strobb. 530.

⁵ *Supra*, § 762.

⁶ *Wing v. Mill*, 1 B. & Ald. 104.

⁷ *Sills v. Laing*, 4 Camp. 81.

⁸ *McIlreath v. Margetson*, 4 Dougl. 278; cited as *MacKreath v. Margetson*, 2 Ch. on Con. 11th Am. ed. 887.

been fraudulently altered the amount paid out by the banker on such cheque.¹

§ 764. The owner of a ship who is compelled to pay the crew's maritime lien for wages may recover the amount so paid from the person under whose employment of ship and crew the debt was incurred.² And where the master of a ship has bound the ship and cargo for necessary repairs by bottomry bonds, the owner of goods, who has been compelled in part to pay such bonds in order to release his goods, may recover the amount so paid from the ship owner.³ But when a ship is owned in equal shares by two persons, A. and B., and A., without B.'s knowledge, repairs the vessel in a home port, the money advanced for this purpose cannot be recovered by A. from B.⁴

Party paying maritime lien for another may claim reimbursement.

§ 765. As has already been incidentally noticed, when several parties are co-debtors of a common debt, and one of them is compelled to pay the whole debt, he may recover contribution from the others; and since in this case we cannot resort to the hypothesis of implied promise so far as concerns the claim of a debtor upon a co-debtor with whom he was in no privity, we must fall back on the rule now immediately before us, holding that because the debtor who pays does so as his co-debtor's representative, he is entitled to recover contribution from his co-debtor. The same reason explains the rulings that a surety who pays more than his share is entitled to recover contribution from his co-surety.⁵ Hence, where one of two joint

Co-debtors and co-sureties paying claim entitled to contribution.

¹ Hall v. Fuller, 5 B. & C. 750; see L. C. 4th Am. ed. 120; Edger v. Knapp, 5 M. & G. 758; Kemp v. Finden, 12 M.

² Leake, 2d ed. 88; Johnson v. & W. 423; Ellis v. Emmanuel, L. R. 1 Steam Packet Co., L. R. 3 C. P. 38. Ex. D. 157; Steel v. Dixon, L. R. 17

³ Duncan v. Benson, 3 Ex. 644; see Ch. D. 825; Powers v. Nash, 37 Me. Lloyd v. Guibert, L. R. 1 Q. B. 115. 322; Boardman v. Paige, 11 N. H. 431;

⁴ Benson v. Thompson, 27 Me. 471. Miller v. Sawyer, 30 Vt. 417; Chaffee

⁵ *Infra*, § 835; Leake, 2d ed. 80; v. Jones, 19 Pick. 264; Campbell v. Theobald, Prin. and Sur. ch. 11; 1 Mesier, 4 John. Ch. 334; Parker v. Story, Eq. Jur. 12th ed. § 499; Har- Ellis, 2 Sandf. 223; Coburn v. Whee- bert's case, 3 Coke, 11b; Dering v. lock, 34 N. Y. 440; Bobbitt v. Shryer, Winchilsea, 1 Cox, 31; 1 Wh. & Tu. 70 Ind. 513; Hall v. Robinson, 8 Ired.

accommodation payees and indorsers pays the whole of the note, he may recover contribution from the other.¹ To establish the relationship of co-debtors or co-sureties, no concert or unity as to time or amount is necessary; nor need the fact of the joint obligation be reciprocally known.² But there must be co-liability; and hence, a debtor whose liability is extinguished by the statute of limitation, cannot be compelled to contribute.³—A second indorser on a promissory note is not liable to the first, though both are accommodation indorsers, unless it be proved that they have agreed to be liable as co-sureties.⁴ Nor is a surety liable to contribute to reimburse a party who, though technically a fellow-surety, is really the principal debtor.⁵ Nor can a special supplementary guarantor be made to contribute to reimburse a co-surety in a matter to which the obligation of the guarantor does not reach;⁶ nor is an accommodation guarantor bound to contribute to reimburse a co-guarantor for whose accommodation alone he signed the contract of guaranty.⁷ Whether there is this joint liability is often a matter of extrinsic proof, the understanding of the parties being in this way established;⁸ though evidence will not be received to establish an obligation in conflict with the terms of a written contract.⁹—An inde-

56. See *Batchelder v. Fiske*, 17 Mass. 464; *Himes v. Keller*, 3 W. & S. 401; see also *Brandt on Suretyship*, §§ 220 *et seq.*

¹ *Steckel v. Steckel*, 28 Penn. St. 235.

² *Dering v. Winchilsea*, 1 Cox, 318; *Whiting v. Burke*, L. R. 10 Eq. 539; *Chaffee v. Jones*, 19 Pick. 260. See *Sibley v. McAllaster*, 8 N. H. 389; *Norton v. Coons*, 3 Denio, 130; *Ponder v. Carter*, 12 Ired. L. 242; *McKenna v. George*, 2 Rich. Eq. 15; *Van Petten v. Richardson*, 68 Mo. 379.

³ *Craythorne v. Swinborne*, 14 Ves. 160; *Peaslee v. Breed*, 10 N. H. 489; *Boardman v. Paige*, 11 N. H. 431.

⁴ *Pars. II.* 36; *McDonald v. Magruder*, 3 Pet. 470; *Decreet v. Burt*, 7 Cush. 551; *Westen v. Chamberlain*, 7 Cush. 404; *Hogue v. Davis*, 8 Grat. 4.

⁵ *Pickering v. Marsh*, 7 N. H. 192; *Cutter v. Emery*, 37 N. H. 567.

⁶ *Keith v. Goodwin*, 31 Vt. 268; *Harris v. Warner*, 13 Wend. 400.

⁷ *Turner v. Davies*, 2 Esp. 478; *Thomas v. Cook*, 8 B. & C. 728.

⁸ *Turner v. Davis*, 2 Esp. 478; *Clapp v. Rice*, 13 Gray, 403; *Taylor v. Savage*, 12 Mass. 98; *Davis v. Barrington*, 30 N. H. 517; *Cutter v. Emery*, 37 N. H. 567; *Barry v. Ransom*, 12 N. Y. 462; and cases cited *Wh. on Ev.* § 952.

⁹ *Norton v. Coons*, 2 Selden, 33; *McMillan v. Parkell*, 64 Mo. 286. That parties to commercial paper signed as co-sureties, parol evidence is, as between themselves, admissible to show, see *Reynolds v. Wheeler*, 10 C. B. N. S. 561.

pendent guarantor cannot be compelled to contribute to relieve a surety who is primarily responsible for the principal's debt.¹ Nor is the defendant liable to contribution if he become surety to oblige the plaintiff at the latter's request.² But a claim to contribution is not defeated by the mere fact that the debt on which the claim is made is secured by several contracts.³—No previous demand on the co-surety is necessary to sustain the suit.⁴—Inability of the principal to pay is not a condition precedent to recover.⁵—Whether the obligation be joint or joint and several, the principle is that he who relieves others concurrently liable with him from their burden is entitled to contribution from them in proportion to the amount of their relief.⁶ Hence, the executor of a deceased co-debtor is liable for contribution;⁷ though in cases of joint obligation the estate of a deceased surety is absolutely discharged both in law and equity, as against the creditor, but not as against a co-surety.⁸ The surety who pays may come down on the estate of the deceased surety.⁹ "It matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally, or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the same identical debt."¹⁰ In such cases, if the representatives of the deceased obligor

¹ *Longley v. Griggs*, 10 Pick. 121. See *Cutter v. Emery*, 37 N. H. 567.

² *Turner v. Davies*, 2 Esp. 478; *Taylor v. Savage*, 12 Mass. 98; *Apgar v. Hiler*, 4 Zab. 812; and cases cited 2 Ch. on Cont. 11th Am. ed. 894.

³ *Dering v. Winchelsea*, 2 Bos. & P. 270; *Craythorne v. Swinborne*, 14 Ves. 160.

⁴ *Chaffee v. Jones*, 19 Pick. 260; *Collins v. Boyd*, 14 Ala. 505. See *supra*, § 575.

⁵ *Supra*, §§ 597 *et seq.*; *Cowell v. Edwards*, 2 B. & P. 268; *Goodall v. Wentworth*, 20 Me. 322; *Odlin v. Greenleaf*, 3 N. H. 270.

⁶ *Kemp v. Finden*, 12 M. & W. 421; *Boulter v. Peplow*, 9 C. B. 493; *Sison v. Kidman*, 4 Scott N. R. 429; *Chaffee*

v. Jones, 19 Pick. 260; *Parker v. Ellis*, 2 Sandf. 223; *Armitage v. Pulver*, 37 N. Y. 497. See *McCune v. Belt*, 45 Mo. 174.

⁷ *Bachelder v. Fiske*, 17 Mass. 464; *Bradley v. Burwell*, 3 Denio, 61; *Barry v. Ransom*, 12 N. Y. 462; *Johnson v. Harvey*, 84 N. Y. 363; *Chipman v. Morrill*, 20 Cal. 130; and cases cited *infra*, § 766.

⁸ *Ibid.* See *Waters v. Riley*, 2 Har. & G. 305; *infra*, §§ 820, 832.

⁹ *Infra*, §§ 766, 820. As to contribution by heirs of surety, see *Stevens v. Tucker*, 73 Ind. 73.

¹⁰ Story Eq. Jur. 12th ed. § 495; citing *Dering v. Winchelsea*, 1 Cox, 318; 2 B. & P. 270; *Stirling v. Forrester*, 3 Bligh, 590.

are liable, then contribution lies.¹ The payment, however, in order to sustain a claim for contribution, must have been obligatory;² though to make it such it is not necessary that a suit should be instituted. It is enough if the payment be one which the party making it could have been compelled to make.³ It makes no matter, in such case, what is the form the surety's liability takes; it is enough if he is legally bound.⁴ The promise to reimburse in such cases is a part of the contract assumed to exist between the co-sureties when they enter into the contract of suretyship.⁵—A party who unnecessarily contests a claim, cannot recover from his co-debtors their proportion of the expenses of litigation.⁶ The weight of authority, however, is that he is entitled to recover from his co-debtors their share in the costs of any litigation he may have judiciously resorted to for their joint protection.⁷ Contribution may in any view be obtained for acts incurred in a procedure jointly authorized by the co-sureties.⁸—In equity the co-debtor who pays is entitled to recover from the co-debtor he sues the proportion the latter would be required to pay, striking out such co-debtors as are insolvent;⁹ though it

¹ *Infra*, § 766.

² *Infra*, § 835.

³ *Supra*, § 761; *Pitt v. Purssord*, 8 M. & W. 538; *Davies v. Humphreys*, 6 M. & W. 153; *Odlin v. Greenleaf*, 3 N. H. 270; *Shaw v. Loud*, 12 Mass. 447; *Frith v. Sprague*, 14 Mass. 455; *Chaffee v. Jones*, 19 Pick. 260; *Lucas v. Ins. Co.*, 6 Cow. 635; see for cases *supra*, § 761; *infra*, § 835.

⁴ *Beal v. Brown*, 13 Allen, 114. On the general question of liability, see *Kemp v. Findon*, 12 M. & W. 421; *Lidderdale v. Robinson*, 2 Brock. 160; *Fletcher v. Grover*, 11 N. H. 369; *Chaffee v. Jones*, 19 Pick. 260; *Mitchell v. Sproul*, 5 J. J. Marsh. 270.

⁵ *Batard v. Hawes*, 2 E. & B. 287; *Peaslee v. Breed*, 10 N. H. 489, following in this respect the rule adopted in reference to the relations of the surety to the principal. *Appleton v. Bascom*, 3 Met. (Mass.) 169; *infra*, § 769.

⁶ *Kemp v. Findon*, 12 M. & W. 424; *Davis v. Emerson*, 17 Me. 64; *Fletcher v. Jackson*, 23 Vt. 593; *Beckley v. Munson*, 22 Conn. 279.

⁷ *Theob. on Prin. & Sur.* § 286; *Kemp v. Findon*, 12 M. & W. 421; *Davis v. Emerson*, 17 Me. 64; *Beckley v. Munson*, 22 Conn. 299; *Bonney v. Seeley*, 2 Wend. 481; *Leary v. Cheshire*, 3 Jones Eq. 170; *Cleveland v. Covington*, 3 Strob. 184; *Furnold v. Bank*, 44 Mo. 336; and see discussion in *Parsons*, i. 33-4; 1 Ch. Cont. 11th Am. ed. 894. As limiting such liabilities, see *Knight v. Hughes*, 3 C. & P. 467; *Roach v. Thompson*, M. & M. 487; *Boardman v. Page*, 11 N. H. 431.

⁸ *Edgar v. Knapp*, 5 M. & G. 75.

⁹ *Cowell v. Edwards*, 2 B. & P. 268; *Hole v. Harrison*, 1 Ch. Cas. 246; *Henderson v. McDuffee*, 5 N. H. 38; *Mills v. Hyde*, 19 Vt. 59; see *Story on Cont.* § 1144. That the rules of law and equity

is in some jurisdictions otherwise at law, it being held that the plaintiff can only recover the proportion that the defendant would have to pay supposing all the co-debtors were solvent.¹ And in any view only the amount actually paid in excess can be recovered.²—Courts of equity, also, have held sureties, on payment of their principal's debt to the creditor, entitled to the benefit of all the collateral securities, both legal and equitable, which the creditor holds on account of the debt.³—The obligation of contribution is several; and hence one surety may release one of his co-sureties without affecting his right against the others.⁴—An agreement, also, by the creditor, giving time to one surety, does not relieve co-sureties from the duty of contribution.⁵ The discharge, also, of a surety from his principal debt, does not, unless that debt be in itself extinguished, release him from liability to his co-sureties.⁶—Where the plaintiff in a suit for contribution seeks to reimburse himself for a loss in an illegal adventure, and where the object of the suit is to indemnify him for an act condemned by the *lex fori*, he cannot obtain the aid of the court.⁷

as to principal and surety are substantially the same, see *Cooper v. Evans*, L. R. 4 Eq. 45.

¹ *Browne v. Lee*, 6 B. & C. 689; *Cowell v. Edwards*, 2 B. & P. 268; *Currer v. Fellows*, 7 Foster, N. H. 366; *Chaffee v. Jones*, 19 Pick. 265; cited *Parsons*, ii. 35.

² *Tarr v. Ravenscroft*, 12 Grat. 642; see *Fletcher v. Grover*, 11 N. H. 368. In *Kelly v. Page*, 7 Gray, 213, it was held that a surety in a bail bond, who has settled with the obligee, and taken an assignment of the judgment obtained by the obligee against the two sureties, can only recover on the judgment against his fellow surety half the amount of the judgment.

³ *Story Eq. Jur.* 12th ed. § 499; *Craythorne v. Swinburne*, 14 Ves. 159; *Jones v. Davis*, 4 Russ. 277; *Hodgson v. Shaw*, 3 My. & K. 183; *Gould v. Fuller*, 18 Me. 364; *Wilcox v. Bank*, 7

Allen, 270; *Bowditch v. Green*, 3 Met. 360; *Atwood v. Vincent*, 17 Conn. 576; *McLean v. Towle*, 3 Sandf. 117; *York v. Landis*, 65 N. C. 535; *State Bank v. Campbell*, 2 Rich. Eq. 180. That the surety may insist on an assignment of securities, see *Story Eq. Jur.* 12th ed. § 499 *a*.

⁴ *Kelby v. Steel*, 5 Esp. 192; *Graham v. Robinson*, 2 T. R. 282; *Birkley v. Presgrave*, 1 East, 220; *Fletcher v. Jackson*, 23 Vt. 591; *Parker v. Ellis*, 2 Sandf. 223; *Crowdus v. Shelby*, 6 J. J. Marsh. 61; *Parsons*, ii. 35; *Fletcher v. Grover*, 11 N. H. 368.

⁵ *Dunn v. Slee*, Holt, N. P. 399; *Draper v. Wald*, 13 Gray, 580.

⁶ *Clapp v. Rice*, 15 Gray, 557; see *Warner v. Morrison*, 3 Allen, 566.

⁷ *Booth v. Hodgson*, 6 T. R. 405; *Merryweather v. Nixan*, 8 T. R. 186; *Farebrother v. Ansley*, 1 Camp. 343; *supra*, § 340.

Where, however, the suit is not to indemnify the plaintiff in wrong-doing, but to obtain money inequitably retained by the defendant, the fact that the money was the produce of an adventure technically illegal is no defence.¹

§ 766. We have already noticed instances in which the liability of co-sureties and co-guarantors to contribute has been held to be limited by special agreement.² The right to contribution is subject to such limitations; and each surety may by the common contract fix the amount of his liability.³ A surety may also limit the particular parties for whom he is to be bound.⁴ A party, also, who becomes surety to oblige another cannot be liable to such other for contribution.⁵ It is not until the surety pays in excess of his share that his claim against his co-surety originates.⁶ Contribution, also, may be limited by agreement between joint debtors contracting or extinguishing particular indebtedness.⁷ But although the survivor of one of several co-debtors may be exclusively liable to the creditor, he may come down on the estates of his co-debtors for contribution; and the same duty of contribution exists as when all the parties are living and one is compelled to pay the entire debt.⁸ Individual partners, also, when compelled to pay the partnership debt, may obtain contribution according to the proportion established by the partnership articles,⁹ though the rules of technical contributionship do not in such cases apply.¹⁰—It is not necessary that the parties should have signed the same contract; it is enough if they

Contri-
bution
limited by
contract
between
parties.

¹ *Supra*, § 354; *Betts v. Gibbons*, 2 A. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66; *Bailey v. Bussing*, 28 Conn. 455.

² *Supra*, §§ 756 *et seq.*; and see *Craythorne v. Swinburne*, 14 Ves. 160.

³ 1 Story's Eq. Jur. 12th ed. §§ 495 *et seq.*; *Pendlebury v. Walker*, 4 Y. & C. 424.

⁴ *Harris v. Warner*, 13 Wend. 400; Story's Eq. Jur. 12th ed. § 498.

⁵ *Turner v. Davies*, 2 Esp. 478.

⁶ *Davies v. Humphreys*, 6 M. & G. 153; *supra*, § 758.

⁷ *Turner v. Davies*, 2 Esp. 479; *Thomas v. Cook*, 8 B. & C. 728; *Harris v. Warner*, 13 Wend. 400.

⁸ *Supra*, § 765; *Prior v. Hembrow*, 8 M. & W. 889; *Haughton v. Bayley*, 9 Ired. L. 337; and cases cited *supra*, § 765.

⁹ *Infra*, § 767; *Beresford v. Brown- ing*, L. R. 1 C. D. 30.

¹⁰ *Pearson v. Skelton*, 1 M. & W. 504; *Sadler v. Nixon*, 5 B. & Ad. 936.

were jointly responsible for the same debt, either as co-principals or co-sureties.¹

§ 767. The principles which have just been stated apply to payments by directors of an association who have authority to contract debts for the association and who seek contribution from fellow-members. They may be personally responsible; but they are entitled to be reimbursed by those whom they represent.²

Same principle extended to members of associations.

This applies *a fortiori* to cases where there is an express contract of suretyship.³—So far as concerns partners, the proper mode of obtaining contribution is by proceedings in equity, by which a balance can be properly struck and the question of actual indebtedness determined on a full survey of the accounts.⁴

§ 768. A surety who pays his principal's debt is entitled (supposing he has no security covering the debt) to come on his principal; and though this may be sustained on the ground that the principal when he obtains the surety's aid implicitly promises to reimburse, yet it may also be explained by the rule before us, that a person who as another's representative is required to make a payment, can recover that payment from the person represented.⁵ Hence, an accommodation signer of a bill of exchange who is compelled to pay, may recover the money he paid from the party whom he signed to accommodate.⁶

Surety who pays principal's debt entitled to come on principal.

¹ *Dering v. Winchelsea*, 2 B. & P. 270; *Norton v. Coons*, 3 Denio, 130.

² *Supra*, § 757; *Tyrrell v. Washburn*, 6 Allen, 466; see *Bailey v. Macaulay*, 13 Q. B. 115; *Batard v. Hawes*, 2 E. & B. 287; *Boulter v. Peplow*, 9 C. B. 493; *Murray v. Bogert*, 14 Johns. 318. As to stockholders of corporations, see *Wincock v. Turpin*, 96 Ill. 135.

³ *Coburn v. Wheelock*, 34 N. Y. 440.

⁴ *Story's Eq. Jur.* 12th ed. §§ 504 *et seq.*; and see cases cited on partnership in § 766.

⁵ *Leake*, 2d ed. 79, citing *Toussaint v. Martinnant*, 2 T. R. 105; *Pownal v.*

Ferrand, 6 B. & C. 439; *Hall v. Smith*, 5 How. U. S. 96; *Smith v. Sayward*, 5 Greenl. 504; *Powers v. Nash*, 37 Me. 322; *Pearson v. Parker*, 3 N. H. 366; *Appleton v. Bascom*, 3 Met. 169; *Powell v. Smith*, 8 Johns. 249; *Ward v. Henry*, 5 Conn. 596; *Ainslie v. Wilson*, 7 Cow. 662; *Lowry v. Bank*, 2 W. & S. 210; *Gray v. Bowles*, 1 Dev. & B. 437. In *Pownal v. Ferrand* an indorser of a bill of exchange, being sued by the holder, was held entitled to recover the money paid from the acceptor; see *supra*, §§ 759 *et seq.*

⁶ *Ibid.*; *Driver v. Burton*, 17 Q. B. 989; see *Gamsey v. Allen*, 27 Me. 366.

Bail, also, can recover from the principal all expenses they have legitimately incurred in consequence of their obligation on his account.¹ When, also, the surety of a surety, being legally bound so to do, pays the debt of the principal, the same rule applies, though the payment was made without a request from the principal.² An administrator of a surety, paying personally the principal's debt, is also entitled to recover from the principal.³—The right of action accrues from the time the money is paid,⁴ though the promise dates back to the time when the engagement of suretyship between the principal and the surety was made.⁵—But a surety extinguishing a principal's debt in part, can only recover the sum of money that he has actually paid.⁶

§ 769. A surety who receives money from the principal is obliged to share this money with his co-sureties; and where an action for contribution is brought by one surety against another, the plaintiff or defendant (as the case may be) is obliged to account for the sum thus received.⁷ The same rule has been held to apply to securities received.⁸—Where a surety obtains from the principal debtor a security for the liability he has undertaken, he is bound to bring into hotch-pot, for the relief of his co-sureties, any benefit which he receives under the security, though he originally bargained with the principal debtor that he should have the security, and though this bargain and the fact of the security having been given were unknown at the time to the co-sureties.⁹

¹ *Fisher v. Fallows*, 5 Esp. 171.

² *Hall v. Smith*, 5 How. U. S. 96.

³ *Mowry v. Adams*, 14 Mass. 327; *Williams v. Moore*, 9 Pick. 432.

⁴ *Davies v. Humphreys*, 6 M. & W. 153; *Kearsley v. Cole*, 16 M. & W. 128.

⁵ *Batard v. Hawes*, 2 E. & B. 287; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Lowry v. Bank*, 2 W. & S. 210; *Dolyns v. McGovern*, 15 Mo. 662.

⁶ *Supra*, § 758; *Parker v. U. S.*,

Peters C. C. 266; *Morrison v. Berkey*, 7 S. & R. 238; *Pursel v. Ellis*, 5 W. & S. 525.

⁷ *Bachelor v. Fisk*, 17 Mass. 464.

⁸ *Theob. on Princ. & Sur.* § 283; 1 *Story's Eq. Jur.* § 499; *Story on Cont.* § 1152; but see *Bowditch v. Green*, 3 Met. 360; *Himes v. Keller*, 3 W. & S. 401; see *supra*, § 765.

⁹ *Steel v. Dixon*, L. R. 17 Ch. D. 825.

§ 770. An insurer, who is compelled to pay a loss, is, on the same reasoning, entitled to recover from any party primarily liable for the loss against which the insurer insured. The insurer may be regarded as paying as the representative of such parties, and hence, entitled to recover from them. Hence, an insurer when compelled to pay a loss by fire is entitled to recover from the party negligently causing the fire;¹ and an insurer compelled to pay a loss by storm is entitled to recover from the person negligently causing the shipwreck.²

Insurer may recover from person causing the loss.

§ 771. As has been already seen,³ money paid for an illegal purpose, but not yet appropriated to such purpose, can be recovered back in this form of suit. There can be no recovery, however, of money not only contributed to, but employed intentionally in consummating an illegal design.⁴ Nor can a party who is compelled to pay for a joint tort recover contribution from his confederates in the tort.⁵ It is otherwise when there was no complicity between the parties, as in cases where one co-proprietor is made liable for the negligence of a servant, in which case he can recover contribution from his co-proprietor, neither party being personally derelict.⁶

Money contributed to illegal enterprise cannot be recovered back; nor can tort-feasor recover contribution.

¹ *Commercial Union Ins. Co. v. Lister*, L. R. 9 Ch. 483; *North British Ins. Co. v. London Ins. Co.*, L. R. 5 Ch. D. 569.

² *Yates v. Whyte*, 4 Bing. N. C. 272; *Simpson v. Thompson*, L. R. 3 Ap. Ca. 279; see *Leake*, 2d ed. 82.

³ *Supra*, § 354.

⁴ *Ibid.*; *supra*, § 340.

⁵ *Supra*, § 340; *Merryweather v. Nixan*, 8 T. R. 186; *Armstrong v. Toler*, 11 Wheat. 258; *Campbell v. Phelps*, 1 Pick. 65; *Lowell v. R. R.*, 23 Pick. 24; *Peck v. Ellis*, 2 John. Ch. 131.

⁶ *Woolley v. Batte*, 2 C. & P. 417; see *Pearson v. Skelton*, 1 M. & W. 504.

CHAPTER XXV.

ACCOUNT STATED.

Where debt is admitted, promise to pay is implied, § 774.	No defence that indebtedness was merely equitable, § 777.
An account may be evidence in favor of party stating, § 775.	Account stated not conclusive, § 778.
Account stated proved by parol, § 776.	Admission must be specific, § 779.
	Account settled between parties establishes only balance due, § 780.

§ 774. AN account stated was, by a fiction of the old law of pleading, supposed to exist whenever one party admitted an indebtedness to another. In our present practice, adopting the fiction in this respect, when a balance is thus admitted, a promise to pay it is implied. To whatever sum is admitted, the hypothesis of an account stated is applicable as the starting of a new indebtedness.¹ A single charge may be the basis of such an admission, or a series of charges, as the case may be.²—Among business men, when the usage is to return promptly accounts submitted to them, retention of an account without exception may be regarded as an admission of its correctness.³ It is otherwise, however, when there is no such usage. In such case the retention of an account does not afford the slightest inference of approval of its contents. And this is the ordinary rule with tradesmen's bills.⁴

¹ *Holmes v. De Camp*, 1 Johns. 34. *Montgomerie v. Ivers*, 17 Johns. 38;
² Ch. on Pl. 16th Am. ed. (1879) 372; *Leake*, 2d ed. 119; *Anson*, 325; *Martens v. Nottebohm*, 4 Grat. 163.
and see, generally, *Knowles v. Michell*, 13 East, 249; *Jarrett v. Leonard*, 2 M. & S. 265; *Highmore v. Primrose*, 5 M. & S. 65; *Irving v. Veitch*, 3 M. & W. 106; *Hopkins v. Logan*, 5 M. & W. 241; see *Perkins v. Hart*, 11 Wheat. 256; *Holmes v. De Camp*, 1 Johns. 36;
³ *Wiggins v. Burkham*, 10 Wall. 129; *Hayes v. Kelley*, 116 Mass. 300; *Tams v. Levis*, 42 Penn. St. 402.
⁴ *Gibney v. Marchey*, 34 N. Y. 301; *Champion v. Joslyn*, 44 N. Y. 653; and other cases cited, Wh. on Ev. § 1140.

§ 775. When both parties have access to the books from which the account is drawn, and have authority to object from time to time to the mode of keeping the same, an account rendered may be evidence in favor of one of the parties when sent to the other and retained by him without objection.¹

An account may be evidence in favor of party stating.

§ 776. An account stated may be made by word of mouth; or it may consist of a short memorandum in writing, capable of being explained by parol;² or it may be embodied in a note or other document indicating indebtedness, the reception of the written admission not excluding proof of oral admission.³ Between parties in privity with each other, negotiable paper may be evidence of an account stated,⁴ and so may an I. O. U.⁵ But an account stated is merged in a contract under seal when covering the same indebtedness and when the sealed document was given to secure the debt.⁶ No merger, however, exists unless the sealed instrument be for the same specific debt.⁷

Account stated proved by parol.

§ 777. It is no defence to a suit on an account stated that the debt was due only in equity. A trustee, for instance, may make himself liable on an account stated by stating his indebtedness on his trust receipts, though for these, independently of his admission, he could have been sued only in a court of

No defence that indebtedness was merely equitable.

¹ Symonds v. Gas Co., 11 Beav. 283; Boardman v. Jackson, 2 Ball & B. 382; Lodge v. Prichard, 3 De Gex, M. & G. 906; Anding v. Levy, 57 Miss. 51; see Wh. on Ev. § 1140.

² Wh. on Ev. § 1122 *et seq.*, 1133; Moreland v. Isaac, 20 Beav. 392; Currier v. R. R., 31 N. H. 209; see Gilson v. Stewart, 7 Watts, 100.

³ Singleton v. Barrett, 2 C. & J. 368; Newhall v. Holt, 6 M. & W. 662; Lockwood v. Thorne, 18 N. Y. 285; Champion v. Joslyn, 44 N. Y. 656; Stowe v. Sewall, 3 St. & P. 67.

⁴ Wheatley v. Williams, 1 M. & W.

533; Grant v. Vaughan, 3 Burr. 1516; Burmester v. Hogarth, 11 M. & W. 97; Bowers v. Hurd, 10 Mass. 427; Fisher v. Fisher, 98 Mass. 303; Mowry v. Bishop, 5 Paige, 98.

⁵ Douglass v. Holme, 4 P. & D. 685; Jacobs v. Fisher, 1 C. B. 178; Wilson v. Wilson, 14 C. B. 616; Fesenmayer v. Adcock, 16 M. & W. 449; Curtis v. Rickards, 1 M. & Gr. 47.

⁶ *Supra*, § 684; Leake, 2d ed. 153, 935; Owen v. Homan, 3 Mac. & G. 407; Price v. Moulton, 10 C. B. 574.

⁷ Hoyt v. Wilkinson, 10 Pick. 31.

equity.¹ The same distinction applies to an indebtedness admitted at the close of partnership accounts.²

§ 778. Even though the account was settled definitely between the parties, it does not conclude them, but Account stated not conclusive. parol, or other extrinsic evidence, is admissible to show that it was based on error,³ and that there was no actual indebtedness from the defendant to the plaintiff,⁴ or that there was no consideration, or that the consideration was illegal.⁵ Until final settlement such accounts are always open to correction; and even after settlement on proof of mistake.⁶ To the rule, however, that an account stated is only *prima facie* proof, there is an exception in those cases in which there is an estoppel based on mutual concessions, or some new consideration which it would be contrary to good faith to impeach. But a stated account not sustained by such new consideration or estoppel may be impeached for mistake or error, whether of omissions or of entry.⁷

§ 779. To sustain an implied promise of this class, the admission must be specific. It is not enough for a Admission must be specific. party to admit a vague indebtedness,⁸ or to say that he thinks he has received the money litigated;⁹ or

¹ *Pardoe v. Price*, 16 M. & W. 456; *Roper v. Holland*, 3 A. & E. 99; *supra*, § 726.

² *Foster v. Allanson*, 2 T. R. 479; *Wray v. Mileston*, 5 M. & W. 21; see *supra*, §§ 722 *et seq.*; *infra*, § 807.

³ Wh. on Ev. § 1133; 1 Story, Eq. Jur. § 524; *Thomas v. Hawkes*, 8 M. & W. 140; *Dails v. Lloyd*, 12 Q. B. 531; *Harden v. Gordon*, 2 Mason, 541; *Perkins v. Hart*, 11 Wheat. 256; *Nichols v. Alsop*, 6 Conn. 477; *Young v. Hill*, 67 N. Y. 162; *Barger v. Collins*, 7 H. & J. 213; *Carroll v. Ridgaway*, 8 Md. 328; *Goodin v. Armstrong*, 19 Ohio, 44; *Kirby v. Watt*, 19 Ill. 393.

⁴ *Gough v. Findon*, 7 Ex. 48; *Lemere v. Elliott*, 6 H. & N. 656; *Petch v. Lyon*, 9 Q. B. 147; *Perkins v. Hart*, 11 Wheat. 237; *Young v. Hill*, 67 N. Y. 162; *Halleck v. State*, 11 Ohio, 400;

Gradwohl v. Harris, 29 Cal. 150; *Murdock v. Finney*, 21 Mo. 138; see *Hoyt v. McLaughlin*, 52 Wis. 280.

⁵ *Kennedy v. Brown*, 13 C. B. N. S. 677.

⁶ Wh. on Ev. §§ 1021, 1028, 1123.

⁷ See cases cited *supra*, §§ 171 *et seq.*, 205 *et seq.*; *Wiggins v. Burkhram*, 10 Wall. 129; *Lockwood v. Thorne*, 18 N. Y. 292; *Hutchinson v. Bank*, 48 Barb. 324; *Ruffner v. Hewitt*, 7 W. Va. 608; *Warner v. Myrick*, 16 Minn. 91; *Wharton v. Anderson*, Sup. Ct. Minn. 1882.

⁸ Wh. on Ev. § 1089; *Green v. Davies*, 4 B. & C. 235; *Lane v. Hill*, 18 Q. B. 252; *Chambers v. Claws*, 21 Wal. 317; *Clarendon v. Weston*, 16 Vt. 332; *Gibney v. Marchey*, 34 N. Y. 301.

⁹ *Hughes v. Thorpe*, 5 M. & W. 656; *Smith v. Jones*, 15 Johns. R. 229.

to say that some money is due without designating the amount or acceding to the plaintiff's designation.¹ Mere admission of reception without recognition, either directly or indirectly, of indebtedness, will not sustain the implication of a promise.² But the allegation of account stated was held to be sustained where a debtor, in answer to an account, inclosed an order for money, and promised to pay the remainder next week;³ where certain items of an account were passed over without objection, to one item alone objection being made;⁴ and where the defendant handed to the plaintiff a memorandum of items of account, to which was attached a promise to pay the plaintiff a specified amount, being the value of a protested bill, it being further stated that the money was to be paid out of the proceeds of certain provisions and lumber.⁵

§ 780. From the account stated, in the sense just given, is to be distinguished an account settled between parties in which the debits are set off against the credits, and in which a balance is struck. In such cases the plaintiff suing for the balance elects to treat his claim as *pro tanto* extinguished by the claim set off on the other side.⁶ But when the account is not settled between the parties, and the plaintiff merely puts in evidence the defendant's account, this does not preclude the plaintiff from disputing the defendant's entries in his own favor.⁷

Account settled between parties establishes only balance due.

¹ Teal v. Anty, 2 B. & B. 99.

and see generally Claire v. Claire, 10

² Tucker v. Barrow, 7 B. & C. 623.

Neb. 54.

³ Peacock v. Harris, 10 East, 104; see Vinal v. Burrill, 16 Pick. 401; Sugar v. Davis, 13 Ga. 462.

⁴ Chisman v. Count, 2 M. & G. 307;

⁶ Leake, 2d ed. 122; Ashby v. James, 11 M. & W. 542; Callander v. Howard, 10 C. B. 290; Laycock v.

Pickles, 4 B. & S. 497.

Wh. on Ev. § 1140.

⁷ Rose v. Savery, 2 Bing. N. C. 145;

⁵ Montgomerie v. Ivers, 17 Johns. 38; see Wh. on Ev. § 1133.

CHAPTER XXVI.

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I. PLAINTIFFS.

§ 784. WE have already seen that privity, or reciprocal recognition, is essential to establish a contractual relation.¹ Since a suit on a contract cannot be sustained unless there be a contractual relation between the parties, it follows that no one can sue on a contract to which he was not a party.² It would, in fact, be destructive

Only party to contract can sue on it.

¹ *Supra*, §§ 184, 506.

² Ch. on Pl. 16th Am. ed. 3; Tweddle v. Atkinson, 1 B. & S. 393; Price

v. Easton, 1 B. & Ad. 433. See Anderson v. Longden, 1 Wheat. 85; Shear v. Mallory, 13 Johns. 497.

to society if strangers could intervene and undertake litigations in accordance with their own interests and tastes; and such intrusion can only be prevented by the rigid application of the rule that contracts can only be sued on by parties.¹ Of course there may be some cases in which this works hardly; but the rule is so wise and so vital that even in hard cases it continues to be applied. Thus, it has been held that the managers of an association for the mutual insurance of ships could not vest in an agent the power to sue in his own name for sums payable from members for premiums.² A written agreement, also, by a third party, to a constable, to go bail for the debt and costs of an execution in the constable's hands, must be sued out in the constable's name, and not in the name of the plaintiff in the execution.³ A deed *inter partes*, also, cannot operate to release a person not a party, and can only be sued on by a party.⁴ A composition deed, also, does not authorize any creditors to bring suit unless they are named specifically or are included in a general covenant for their benefit;⁵ though it would be otherwise, on the principles above stated, were the creditors suing on such contracts to prove that they did some particular acts—*e. g.*, executed releases—in consideration of the assignment.⁶—To the same effect is a ruling in 1880 in the English court of appeals,⁷ where Jessel, M. R., said: "A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly), will not prevent A. and B. from coming to an agreement the next day releasing the old one." And in a subsequent case,⁸ it was held, as we have seen, that a provision in articles of association that A. shall be solicitor of the company on certain terms, gives him no right of action

¹ The principle has been pushed to its extreme limit in cases in which it is held that a creditor cannot authorize a third person to sue in his own name on a debt due the creditor. *Hybart v. Parker*, 4 C. B. N. S. 209.

² *Gray v. Pearson*, L. R. 5 C. P. 568; *Evans v. Hooper*, L. R. 1 Q. B. D. 45.

³ *Cummings v. Klapp*, 5 W. & S. 511.

⁴ *Storer v. Gordon*, 3 M. & S. 308.

⁵ *Leake*, 2d ed. 445; *Chesterfield v. Hawkins*, 3 H. & C. 677; *Gurrin v. Kopera*, 3 H. & C. 694; *Gresty v. Gibson*, 4 H. & C. 28; *Reeves v. Watts*, L. R. 1 Q. B. 412.

⁶ See *supra*, §§ 24, 527.

⁷ *Empress Engineering Co. in re*, L. R. 16 Ch. 125.

⁸ *Eley v. Ass. Co.*, L. R. 1 Ex. D. 88.

against the company.¹ It is true that at one time it was held in England that on an agreement between A. and B. for the benefit of C., a child of B., suit could be brought by C.² This, however, is no longer law in England,³ where it is now firmly settled that contracts can be sued on only by parties.⁴ In

¹ In a much earlier case, *Pigott v. Thompson*, 3 B. & P. 147, it was held that where a contract was made with certain local commissioners to pay rent "to the treasurer of the commissioners," the commissioners must bring suit, not the treasurer.

² *Dutton v. Pool*, 1 Vent. 318. See *Felton v. Dickinson*, 10 Mass. 287; *Schermerhoyn v. Vanderheyden*, 1 Johns. 139; see *infra*, § 790.

³ *Tweddle v. Atkinson*, *ut supra*.

⁴ Mr. Dicey (*Parties*, Am. ed. 1879, 81) states the rule as follows: "The person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves," citing *Smart v. Chell*, 7 Dowl. 785. See *Anson*, 900 *et seq.* As to the importance of care in this respect, see *Chitty on Pl.* 16th Am. ed. 1879, 1 *et seq.*—So far as concerns merely technical variance, difficulties are now obviated by statutes in force in England and in this country permitting amendments. See *infra*, § 822.

As adhering to the English rule, and conforming to the position taken in the text, see *Segars v. Segars*, 71 Me. 530; *Butterfield v. Hartshorn*, 7 N. H. 345; *Warren v. Batchelder*, 15 N. H. 129; *Lapham v. Green*, 9 Vt. 407; *Hall v. Huntson*, 17 Vt. 244; *Mellen v. Whipple*, 1 Gray, 321; *Field v. Crawford*, 6 Gray, 116; *Exchange Bk. v. Rice*, 107 Mass. 39; *Pettee v. Reppard*, 120 Mass. 522; *Cottage St. Ch. v. Kendall*, 121 Mass. 528 (discussed *supra*, § 528); *Reed v. Bank*, 127 Mass. 295; *Meserve v. Bacon*, 125 Mass. 499; *Moore v. Moore*, 127 Mass. 22; *Butler v. Frank*,

128 Mass. 29; *Stoddard v. Ham*, 129 Mass. 383; *Treat v. Stanton*, 14 Conn. 445; *Colt v. Ives*, 31 Conn. 25; *Burnett v. Jersey City*, 31 N. J. Eq. 341; *Owings v. Owings*, 1 Har. & G. 484; *Ross v. Milne*, 12 Leigh, 204; *Litchfield v. Garrett*, 10 Mich. 426; *Weathers v. Ray*, 4 Dana, 474; but see *infra*, § 785; *Allen v. Thomas*, 3 Mete. Ky. 198; *McLaren v. Hutchinson*, 18 Cal. 80. Cf. *Johnston v. U. S.*, 13 Ct. of Cl. 217.

See, also, *National Bank v. Grand Lodge*, 98 U. S. 123, where a corporation adopted a resolution assuming the payment of certain bonds of an association, provided that the association should issue stock to the corporation to the amount of the bonds, as the bonds were paid. It was held that holders of the bonds could not compel, by a suit in their own name, the corporation to pay the bonds.

In *Nat. Bk. v. Grand Lodge*, 98 U. S. 123, *ut supra*, Strong, J., said: "The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and of the grand lodge—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by

equity as well as in law the right to sue is restricted to those who are parties to the contract. Thus, a bill for specific performance can only be brought by those who are parties to the contract, and "persons strangers to the contract, and therefore neither entitled to the right nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to re-

which the lodge should undertake to lend money to the association, on contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not at all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he

has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required." And see *Johnston v. U. S.*, 13 Ct. of Cl. 217.

Judge Perkins, in a note to the 16th Am. ed. of Ch. on Pl. (1879), after citing some of the above cases, says: "It seems to be the general rule in the American states, that the plaintiff in an action on a simple contract must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract." But though this is the right rule in principle, we cannot, in view of the many conflicting cases above given, regard it as generally accepted in the United States.

It should be added that *Sailly v. Cleveland*, 10 Wend. 156; *Hubbert v. Borden*, 6 Whart. 79; and *Blymire v. Boistle*, 6 Watts, 182, cited by Judge Perkins, are of questionable application to the rule given by him.

In *Bohanan v. Pope*, 42 Me. 93, A. contracted to haul logs for E., who was to pay the men engaged by A. D. was engaged by A. for this purpose, and it was held that when he elected to sue A., this exhausted his remedy, and that he could not afterwards sue E.

cover damages for the breach of it.”¹ Hence, “in a suit to enforce a contract for the sale of an estate that is under mortgage, made by the mortgagor, the mortgagee cannot be properly joined as a party; although his concurrence may be necessary to the conveyance.”² “Nor in a suit on a contract of sale by the mortgagee under a power of sale, can the mortgagor be joined as a party.”³

¹ Per Cottenham, L. C., in *Tasker v. Small*, 3 M. & Cr. 69; *Wood v. White*, 4 M. & C. R. 460; *Paterson v. Long*, 5 Beav. 186.

² Leake, 2d ed. 442; citing *Tasker v. Small*, 3 M. & Cr. 69.

³ *Ibid.*; *Corder v. Morgan*, 18 Ves. 344; *Harry v. Davey*, L. R. 2 Ch. D. 721.

According to Mr. Pollock (3d ed. 219), “the doctrines of equity are not so free from doubt. There is clear and distinct authority for these propositions: when two persons, for valuable consideration as between themselves, contract to do some act for the benefit of another person not a party to the contract—(1) That person cannot enforce the contract against either of the contracting parties, at all events, if not nearly and legitimately related to one of them. *Colyear v. Mulgrave*, 2 Kee. 81. Probably the only exception is that mentioned above, in favor of children provided for by marriage settlement. (2) But either contracting party may enforce it against the other, although the person to be benefited had nothing to do with the consideration. *Davenport v. Bishopp*, 2 Y. & C. 451; 1 Ph. 698, 704. On the other hand, the case of *Gregory v. Williams*, 3 Mer. 582, shows that a third person for whose benefit a contract is made may join as co-plaintiff with one of the actual contracting parties against the other, and insist on the arrangement being carried out.” But this case can be reconciled with the other authori-

ties on the ground that what the plaintiff sued on was virtually a declaration of trust, in which the other parties had joined. See *Empress Engineering Co. in re*, L. R. 16 Ch. D. 125–129.

There can be no question that by the Roman classical standards, no person can sue on a contract to which he is not a party. Whether this continues in force as part of the Roman common law, and how far it is modified by recent codes, are questions which have given rise to conflicts of opinion at least as great as those between the courts of this country as to the rights of third parties to sue.

Vangerow, III. (7th ed.) § 608, after a careful examination of the Roman standards, holds that a third party can only sue in cases where the transaction may be considered under the special facts as *negotiorum gestio*.

Windscheid (Pandekt. II. § 316) distinguishes with great emphasis between contracts for the benefit of third parties and agencies. The promisee in contracts for the benefit of third parties, is the party, he holds, who is to sue, though he admits exceptions: (1) where an assignment is actually made for, and accepted by the third party; and (2), where there is privity between the debtor and the third party.

A treatise on the same topic by Bähr will be found in 6 Ihering Jahr. 1863, No. 3. By Bähr the right is rested in agency. The *primus* in accepting the promise did so as agent of the *tertius*.

The Prussian Landrecht, I. 5, pro-

§ 785. In this country the preponderance of authority is to the effect that a plaintiff may bring suit on a simple contract to

vides as follows: "§ 74. The benefit of third parties may be the object of a contract. § 75. The third party, however, can only sue on a contract to which he was neither mediate nor immediately a party, when he has acceded to it with the assent of the other parties. § 76. Until this takes place, a contract for his benefit may be modified or cancelled by the contracting parties."

In the French Code Civil, we have the following: "Art. 1165. Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point aux tiers, et elles ne leur profitent que dans les cas prévu par l'art. 1121. Art. 1121. On peut pareillement stipuler au profit, d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer, si la tiers a déclaré vouloir en profiter."

In Austria (*Gesetzbuch*, § 881) no person whatever can sue on a contract to which he is not a party.

A review of the controversy is given by Dr. Joseph Unger, in 10 *Ihering's Jahr.* (1871) pp. 1 *et seq.* He begins by attributing the strictness of the Roman rule to the jealousy with which the Romans regarded all attempts to limit personal independence. Not only could no man be compelled to accept a loan or even gift unless made on his own prior request, but agency was restricted to matters in which the agent was the principal's servant without discretion. The genius of Rome was individual energy organized by law. "That individual activity governs the world; that each man carries his rights in his own hands; that each man must pro-

tect himself by himself; these are the quintessence of the old Roman system." (*Ihering*, *Geist des R. R.* 1, 109.) Under this system the individual, so Unger argues, begins and terminates his own civil liability. Self-employment, self-support, self-vindication, self-protection, and with them self-seeking and self-love were the prime factors in Roman life. The acquisition of rights depended exclusively on the individual activity and even on the individual initiation of the party to be benefited. Hence judicial process by the Roman law is virtually organized self-support. The fundamental principle of Roman jurisprudence is that each person acts for himself; he must act in his own name, in his own interest. The principle was not placed exclusively on ethical or utilitarian grounds. It was not regarded as we regard it, as a suggestion of prudence, "aide-toi, et le ciel t'aidera." It was made an absolute rule of jurisprudence—he who acts must act for himself. Each individual was limited to his own concerns, was required personally to lay the basis of his own rights. One of the consequences of this position was the rule that rights could not be acquired through agents themselves capable of independent business activity.—"Per liberas personas, quæ in potestate nostra non sunt, acquiri nobis nihil potest." *Paul. R. S. V.* 2, § 2. See further *I.* 126, § 2 *D. de V. O.* 45, 1; *L. 1 C. per quas person.* 4. 27. It is true that this gave way, so far as agency was concerned, to a gradual expansion of the right of representation through parties who would carry out absolutely the principal's views. But the principle of the Roman law was fixed that parties must act virtually

which he is not a party when it contains a provision for his benefit. In the supreme court of the United States this view is expressly affirmed.¹ “The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country.”²

In some states it is held that a third party can sue on a contract for his benefit.

in their own person, and in their own names. Whoever undertakes to bind himself must bear the consequence in his own person; if he has acquired a right, the right belongs to him; if he has undertaken a duty, the duty is imposed on him. It is argued by Unger, however, that the Roman rule, based as it was on organized selfishness, does not obtain any longer under the conditions of modern society in which the duty to neighbors is regarded to be as morally imperative as is the duty to self. He is beyond question right in the position that when the conditions of society change, the common law, which is the expression in a judicial shape of the moral sense of the community, changes also. He is right, also, in holding that when a trust is admitted, such trust should be enforced. But in holding that all provision for the benefit of third parties should be held morally binding, and therefore legally binding, he goes too far. Many such provisions are made for the purpose of subjecting the third party to obligations to which no one should be subjected except on his own independent and free consent.

¹ *Hendrick v. Lindsay*, 93 U. S. 143.

² This, however, is somewhat restricted in *National Bank v. Grand Lodge*, 98 U. S. 123, cited *supra*, § 784. As sustaining the conclusion stated in *Hendrick v. Lindsay*, as above given, see *Norwood v. De Hart*, 30 N. J. Eq. 412; *Joslin v. Car Co.*, 7 Vroom, 141; *Ramsdale v. Horton*, 3 Barr, 330;

Beers v. Robinson, 9 Barr, 229; *Kountz v. Holthouse*, 85 Penn. St. 235; *Justice v. Tallman*, 86 Penn. St. 147; *Merriman v. Moore*, 90 Penn. St. 80; *Thompson v. Thompson*, 4 Oh. St. 333; *Davis v. Calloway*, 30 Ind. 112; *Helms v. Kearns*, 40 Ind. 124; *Miller v. Billingsly*, 41 Ind. 489; *Eddy v. Roberts*, 17 Ill. 505; *Beasley v. Webster*, 64 Ill. 458; *Snell v. Ives*, 85 Ill. 279; *Donkersley v. Levy*, 38 Mich. 54; *Johnson v. Collins*, 14 Iowa, 63; *Bassett v. Hughes*, 43 Wise. 319; *Sanders v. Clason*, 13 Minn. 379; *Jordan v. White*, 20 Minn. 91; *Welsh v. R. R.*, 25 Minn. 314; *Thompson v. Gordon*, 3 Strobb. 196; *Brown v. O'Brien*, 1 Richards, 268; *Mason v. Hall*, 30 Ala. 599; *Carver v. Eads*, 65 Ala. 190; *Meyer v. Lowell*, 44 Mo. 328; *Rogers v. Gosnell*, 58 Mo. 589; *New Orleans St. Joseph's Assn. v. Magnier*, 16 La. An. 338; *Morgan v. Mining Co.*, 37 Cal. 534; *Lehow v. Simonton*, 3 Col. 346; *Green v. Richardson*, 4 Col. 584; *Smith v. Mayberry*, 13 Nev. 427. For suits of this class for money had and received, see *supra*, § 728.

In New York, the right of the beneficiary to sue is admitted in cases where the contract was made with the intention to benefit the plaintiff, and there was a duty owing him from the defendant. *Lawrence v. Fox*, 20 N. Y. 268, of which case Judge Rapallo, in *Garnsey v. Rogers*, 47 N. Y. 233, said: “I do not understand that the case of *Lawrence v. Fox* has gone so far as to hold that every promise made by one

§ 786. Many of the cases, however, cited to show that a stranger can maintain an action on a contract, are explicable

person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being neither privy to the contract nor the consideration. To entitle him to an action the contract must have been made *for his benefit*. *He must be the person intended to be benefited, etc.*" In *Vrooman v. Turner*, 69 N. Y. 280, it was said by the court of appeals that, "to give a third party who may derive a benefit from the performance of the promise, an action, there must be, *first*, an intent by the promisee to secure some benefit to the third party, and, *second*, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." See criticism in *Am. Law Rev. Ap.* 1881, 243; and see also *Campbell v. Smith*, 8 Hun, 6; 71 N. Y. 26.

"When two parties for a consideration sufficient as between themselves covenant to do some act, which, if done, would incidentally result to the benefit of a mere stranger, that stranger has not a right to enforce the covenant, though one of the contracting parties might enforce it against the other." *Danforth, J., Lake Ontario Shore R. R. v. Curtiss*, 80 N. Y. 223. And a person for whose benefit a promise is made cannot sue on a contract which cannot be enforced between the original parties.

"I know of no authority to support the proposition that a party not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void as between

the promisor and promisee, for fraud, or want of consideration, or failure of consideration." *Andrews, J., Dunning v. Leavitt*, 85 N. Y. 35.

"If one person make a promise to another for the benefit of a third person, such third person may maintain an action even at law upon it. *Joslin v. Car Co.*, 7 Vroom, 141. And, if a suit be brought in equity, the promisee is not a necessary party to it. *Pruder v. Williams*, 11 C. E. Green, 210;" *Runyon, Ch., Cubberly v. Cubberly*, 33 N. J. Eq. 86; S. P., 1 Pars. Cont. 389; *Barker v. Bucklin*, 2 Denio, 45; *Lawrence v. Fox*, 20 N. Y. 268; see *Marchington v. Vernon*, 1 B. & P. 101, note c.

In Pennsylvania it is said to be "a rudimental principle that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself." *Paxson, J., Merriman v. Moore*, 90 Penn. St. 81, citing *Townsend v. Long*, 77 Penn. St. 143; *Justice v. Tallman*, 86 Penn. St. (5 Norris) 147. But that a stranger is not liable on a contract, see *Biery v. Ziegler*, 93 Penn. St. 367. In *Robertson v. Reed*, 47 Penn. St. 115, where the balance due a contractor was at his request placed to the credit of a third person, it was held that the latter could not maintain an action in his own name for the amount credited. And generally a promise by a debtor to his creditor to pay his debt to a third party will not sustain a suit by such third party against the debtor. *Blymire v. Boistle*, 6 Watts, 182; *Morrison v. Beckey*, 6 Watts, 349; *Torrens v. Campbell*, 74 Penn. St. 470.

In Indiana "it has been many times decided that a promise made by one to

on other grounds. We may take in illustration the line of cases where it is held that where by a contract between A. and B., B. receives money or goods in trust for C., C. can sue in his own name for the deposit.¹ When these cases, however, are scrutinized, it will be found that when B. did not act as the agent of C. (a condition to be presently more fully considered), there was a bargain more or less direct between A. and C.² The recognition, on such a state of facts, of C. as creditor of B. can be explained on the principles of novation, elsewhere discussed.³ If a creditor accepts a new party as a debtor in the place of an old debtor, the exchange of security may be regarded as a

Cases explainable on ground of novation, trust, or negligence.

another, from whom the consideration moves for the benefit of a third, may be sued on by the party for whose benefit the promise was made." Elliott, J., *Clodfelter v. Hulett*, 72 Ind. 141, citing *Raymond v. Pritchard*, 24 Ind. 318; *Josselyn v. Edwards*, 57 Ind. 212; *Campbell v. Patterson*, 58 Ind. 66; *Carter v. Zenblin*, 68 Ind. 436; *Fisher v. Wilmoth*, 68 Ind. 449; see *Loeb v. Weiss*, 64 Ind. 285.

"By repeated decisions of this court, the persons for whose benefit the promise is made may maintain actions in their own names to enforce such promise." Taylor, J., *Kollock v. Parcher*, 52 Wis. 400, citing *Putney v. Farnham*, 27 Wis. 187; *Bassett v. Hughes*, 43 Wis. 319.

"It is well established in this state that a party for whose benefit a stipulation in a simple contract is made may maintain a suit on such stipulation in his own name." Hough, J., *Fitzgerald v. Barker*, 70 Mo. 687. To same effect see *Beardslee v. Morgner*, 4 Mo. Ap. 139; *Raum v. Kaltwasser*, 4 Mo. Ap. 573.

"There is a conflict of the authorities in this country upon the subject, and the right was not recognized in the earlier decisions of this court; but it is

now settled in this state that a third person may maintain an action in his own name upon a contract, supported by a consideration, made in his favor, though not made with him. *Smith v. Lewis*, 3 B. Monr. 229; *Lucas v. Chamberlain*, 8 ib. 276; *Allen v. Thomas*, 3 Met. (Ky.) 198; *Story on Bailments*, § 103; 1 *Chitty on Plead.* 4. And he may sue upon such contract without a consideration passing from him to the promisor." Lewis, C. J., *Moody v. Wiley*, Sup. Ct. Ky. 1881.

¹ *Warren v. Batchelder*, 16 N. H. 580; *Perry v. Swazey*, 12 Cush. 36; *Mellen v. Whipple*, 1 Gray, 319; *Crocker v. Higgins*, 7 Conn. 342; *Dela-ware Canal Co. v. Bank*, 4 Denio, 97; *Barker v. Bradley*, 82 N. Y. 316; *Beers v. Robinson*, 9 Barr, 229; *Justice v. Tallman*, 86 Penn. St. 149; *Merriman v. Moore*, 90 Penn. St. 80; *Beardslee v. Morgner*, 4 Mo. Ap. 139; *Barbaro v. Occidental Grove*, 4 Mo. Ap. 429.

² *Dingeldein v. R. R.*, 37 N. Y. 575; *Johnson v. Knapp*, 36 Iowa, 616; *Beesley v. Webster*, 64 Ill. 488; *Snell v. Ives*, 85 Ill. 279; *McDowell v. Laer*, 35 Wis. 171; and cases cited *Wald's Pollock*, 199-200.

³ *Infra*, §§ 852 et seq.

sufficient consideration for the agreement of the new debtor to pay the debt.¹—Or it may be said that in some of the cases B. acts throughout as C.'s agent, and that in such cases it is proper that the suit should be brought in C.'s name.² Other cases may be explained on the ground of a fiduciary contractual relation between the plaintiff and the defendant. I receive money in trust for C., and the very moment C. says to me, "I hold you as my trustee, and will let the money remain in your hands until I call for it," this establishes a contractual relation, in which if my temporary use of the money is not a sufficient consideration, the confidence bestowed on me is. And this explanation is strengthened by the fact that when we get out of the line of trusts, of novations, and of negligence, the cases are rare in which the right of a party not a stranger to the contract to sue is recognized. Thus, in Illinois, where the laxer view is ostensibly held, it is ruled that only a party can sue on a forfeiture;³ and in Iowa, where the laxer view is also held, it is ruled that the owner of property destroyed by fire cannot maintain an action against a water company which has contracted to supply with water the city in which the property at the time of its destruction is situated.⁴ "One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded on the plainest reasons. The contracting parties control all interests, and are entitled to all rights secured by the contract. If mere strangers may enforce the contract by action, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon."⁵—Another inde-

¹ See *supra*, § 505; *infra*, §§ 882 *et seq.* Some cases, however, cannot be thus explained. Thus, in an Indiana case, in 1880, the maker of a note sold certain real estate in consideration of the purchaser's agreement to pay all his, the vendor's, indebtedness. It was held that the payee might, without any privity on his own part, sue the purchaser on this agreement. *Carter v. Zenblin*, 68 Ind. 436; see *Fisher*

v. Wilmoth, 68 Ind. 449; and see *Johnson v. Knapp*, 36 Ind. 616. Cf. article in *Central Law Journal*, Aug. 27, 1880.

² See *infra*, § 794.

³ *Neimeyer v. Knight*, 98 Ill. 222.

⁴ *Davis v. Water Works Co.*, 54 Iowa, 61, citing *Atkinson v. Water Works*, L. R. 2 Ex. D. 441; *Nickerson v. Hydraulic Co.*, 46 Conn. 24.

⁵ *Beck, J., Davis v. Water Works*, 54 Iowa, 61; *Wh. on Neg.* §§ 438-9-40.

pendent basis on which some of the cases before us may be placed, without invading the principle that none but parties to a contract can sue on it, is that of negligence. The rule is, *sic utere tuo ut non alienum laedas*; and if this rule is violated, it is no defence that the offending party did the wrongful act under the stress of a contract with a third party.¹ On this ground we may explain a remarkable case in New York, in 1881,² where it was held that where a contract was entered into between the state authorities of New York and certain publishers, to the effect that such publishers, in consideration of having given to them the publication of the reports, should be required to furnish other publishers on certain terms, an action would lie against such publishers by parties to whom they refused to sell the reports on specified terms. "The rule," said Miller, J., "is well settled by the decisions of the courts of this state, that an agreement made for a valid consideration by one party with another to pay money to a third, can be enforced by such third person in his own name. . . . Contractors with the state, who assume, for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract enures to the benefit of the individual who is interested in its performance."³ Now this is unquestionable law; but it does not go to sustain the position that a person not a party to a contract can sue on it contractually. All that the argument of Mr. Justice Miller goes to show is that a suit for negligence lies by a party

It would be otherwise in an action on the tort. *Infra*, § 812.—The distinction in the text will sustain the ruling that a policy of insurance, by which certain property of A. is insured, for the benefit of B., B. being the mortgagee of the property, enables B. to sue as plaintiff to recover on the policy. *May on Insurance*, § 447; *Barrett v. Ins. Co.*, 7 Cush. 175. See *supra*, § 24; *infra*, §§ 800–1.

¹ See *infra*, §§ 812, 1043 *et seq.*; Wh. on Neg. §§ 435, 780 *et seq.*

² *Little v. Banks*, 85 N. Y. 258.

³ To this are cited *Weet v. Vil. of Brockport*, 16 N. Y. 161; *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Ins. Co. v. Baldwin*, 37 N. Y. 648; *Johnson v. Belden*, 47 N. Y. 130; *Brooklyn v. R. R.*, 47 N. Y. 476; *McMahon v. R. R.*, 75 N. Y. 231; *Conroy v. Gale*, 5 Lans. 344; all of these being suits for negligence. To this effect see *Schlossmann, Vertrag*, 287.

injured irrespective of contractual relations, against the party inflicting the injury. Of the cases cited by him not one was on a contract; all are for negligence.

§ 786 a. On the principle of novation, also, may be explained the numerous cases in which the owner of mortgaged property sells it under an agreement with the vendee, by which the latter assumes the mortgage debt, and the mortgage creditor accepts the substitution. In such case the substituted debtor is liable to the creditor on the novation.¹ “Even a verbal promise by a purchaser to assume and pay a mortgage is valid, and may be enforced in equity not only by the grantor, but by the holder of the mortgage.”² Such a promise may be inferred from the terms of the document by which the purchaser takes title. “Where land is conveyed subject to a mortgage, the grantee does not undertake or become bound by a mere acceptance of the deed to pay the mortgage debt; but if the grantee takes a deed containing a recital that the land is subject to a mortgage which the grantee assumes, or agrees to pay, a duty is imposed on him by the acceptance, and the law implies a promise to perform it, on which promise, in case of failure, *assumpsit* will lie.”³ But a party acquiring an interest in the

Illustrated
in case of
purchases
of mort-
gaged
property.

¹ *Infra*, §§ 852 *et seq.*; *Halsey v. Reed*, 9 Paige, 446; *Burr v. Beers*, 24 N. Y. 178; *Dingeldein v. R. R.*, 37 N. Y. 575; *Ricard v. Sanderson*, 41 N. Y. 179; *Campbell v. Smith*, 71 N. Y. 26; *Calvo v. Davies*, 73 N. Y. 211; *Girard Ins. Co. v. Stewart*, 86 Penn. St. 89; *Merriman v. Moore*, 90 Penn. St. 78; *Thompson v. Thompson*, 4 Oh. St. 333; *Helms v. Kearns*, 40 Ind. 124; *Fowler v. Fay*, 62 Ill. 375; *Snell v. Ives*, 85 Ill. 279; *Ross v. Kennison*, 38 Iowa, 396; *Jordon v. White*, 20 Minn. 91; *Mason v. Hall*, 30 Ala. 599; *Meyer v. Lowell*, 44 Mo. 328; *Rogers v. Gosnell*, 58 Mo. 589; see, however, *contra*, *Mellen v. Whipple*, 1 Gray, 317; *Pettee v. Peppard*, 120 Mass. 522; *Prentice v. Brimhall*, 123 Mass. 291; *cf.* *Jones on Mortgages*, §§ 748 *et seq.*

² *Jones on Mortgages*, § 750; citing *Bolles v. Beach*, 2 Zab. N. J. 680; *Wilson v. King*, 23 N. J. Eq. 150; *Conover v. Brown*, 29 N. J. Eq. 510; and see to this effect, cases cited *infra*, § 809. That the agreement may be outside of the conveyance, see *Schmucker v. Sibert*, 18 Kans. 104. In New York, the cases are put on the ground that a third person may maintain a suit on a contract made for his benefit. *Thorp v. Coal Co.*, 48 N. Y. 253; *Lawrence v. Fox*, 20 N. Y. 268; *Campbell v. Smith*, 8 Hun, 6; 71 N. Y. 26.

³ *Hough, J., Heim v. Vogle*, 69 Mo. 535; *Fitzgerald v. Barker*, 70 Mo. 685; see *Jones on Mort.* § 748; *Pike v. Brown*, 7 Cush. 133; *Braman v. Dowse*, 12 Cush. 227; *Jewett v. Draper*, 6 Allen, 434; *Furnas v. Durgin*, 119 Mass.

lands after making the promise, cannot sue as plaintiff;¹ and to entitle the third party to sue, there must be either a new consideration or a prior relationship such as would sustain the promise.² On the other hand, in Massachusetts and New Jersey, it is held that no action at law lies by the mortgagee against the purchaser on an implied promise by the latter that he will pay the mortgage.³ But where there is a contractual relation instituted between the mortgagee and the purchaser, the better view is, that the latter should be liable to the former in *assumpsit* for the mortgage debt. As a purchaser of mortgaged property, for instance, I admit my liability to the mortgagee. The concession of accepting me as a debtor is a sufficient consideration to bind me; the additional security he has in the investment is a sufficient consideration to bind him.⁴

§ 787. Putting aside, however, cases of novation and of trust, it needs only a glance at some of the more conspicuous agreements for the benefit of third parties to see that to allow third parties on principle to sue on all contracts for their benefit would not only be inconsistent with rational jurisprudence, but would impose an intolerable burden on business. If no restriction on this be applied, (1) any stranger might interfere in any suit;

Importance of thus restricting right to sue.

500; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 38; *Crawford v. Edwards*, 33 Mich. 354.

¹ *Miller v. Winchall*, 70 N. Y. 437.

² *Vrooman v. Turner*, 69 N. Y. 280; *Cushman v. Henry*, 5 How. N. Y. Pr. 234.

³ *Mellen v. Whipple*, 1 Gray, 317; *Pettee v. Peppard*, 120 Mass. 522; *Prentice v. Brimhall*, 123 Mass. 291; *Crowell v. Hospital*, 27 N. J. Eq. 650. In a Massachusetts case, in 1882, the holder of a mortgage, which had been foreclosed and the property sold at a price less than the mortgage debt, acquired the entire interest in the same property at the same price. It was held by the supreme court that he could not bring an action of contract to recover the balance due on the mort-

gage in the name of the mortgagor, against his grantee, who in the deed to him had assumed the payment of the mortgage against the mortgagor's consent. An action of law upon the stipulation in a deed poll, by which the grantee assumes and agrees to pay as his own debt a previous debt of the grantor, secured by mortgage of the granted premises, must be brought, so it was held, in the name of the grantor only. *Coffin v. Adams*, 131 Mass. 133.

⁴ *Supra*, § 505. A reconveyance from the substituted debtor to the original debtor, before the perfection of the novation, vacates the substituted debtor's liability to the original creditor. *Crowell v. Hospital*, 27 N. J. Eq. 650.

(2) innumerable warring claims might be brought together for the same thing. But this is not all. There are few banking associations that do not undertake to furnish currency for persons of a particular district; there are no charitable associations that do not undertake to raise funds for the benefit of certain designated classes; there are no literary or educational organizations that do not rest on a contract between the parties to supply books or instruction to specified classes; there is no subscription for religious or other purposes that does not have a similar object in view;¹ and if the principle here contested is true, in each of these cases a suit could be maintained by each of the parties to be benefited by the association in question against the persons so associating. No bargain can be conceived of, no matter how confidential, on which strangers could not bring suit; no duty, no matter how delicate, which strangers could not interfere to enforce. There could be no claim on which there could not be as many conflicting suits brought as there are persons interested no matter how remotely; and in the face of the fact that when A. tells B. to hold money for C., A. may revoke this direction at any time before payment to C., it could not be held that C., on such a cause of action, could maintain suit against B.—But the hardship in such cases does not stop with the defendant, who thus is exposed to liabilities he did not assume. The position of the plaintiff, if the view here contested be sound, is also entitled to grave consideration. It may be said that it is a very good thing for me, of which I have no right to complain, to find that somebody has been depositing \$1000 for me at a bank; and that I ought at once to be entitled to bring suit for the deposit. But it may be a very bad thing for me on which I may have serious ground for complaint, since as there is no contract without two parties, if I can sue the new debtor thus put upon me without my assent, he can sue me for failure of consideration or for money paid by mistake.² And aside from this, supposing the money to be a gift, gifts are not always necessarily disinterested. There may be many reasons why I may be unwilling to accept a gift from a person

¹ *Supra*, § 528.

² *Supra*, § 2.

to whom I may not desire to be under obligation. If the depositary, also, by this process becomes my debtor, I by the same reasoning become his creditor, and even supposing I give no pecuniary consideration for what I receive, I may be compromised seriously in some other way. Either there is, or there is not a contractual relation between me and a depositary with whom money is deposited for my benefit. If there is not, then there is no basis for the contention that C. can sue B. for money deposited by A. with B. for C. If there is, then I am contractually bound to every depositary with whom funds may be placed to my credit. The depositary may be a party open to grave exception. I may be credited with a share in some speculation in which my name may be supposed to be of use, and to which, thereby, my influence is pledged, or in some investment in which membership may involve serious future liability. Am I to be bound by such burdens simply because other parties, for reasons satisfactory to themselves, choose to present to me property on which these burdens are imposed?—It may be said, in reply, that although the parties making the provision are bound to me, I am not bound to them. But if they are bound to me, I am bound to them; if I am not bound to them, they are not bound to me.¹—It may also be objected that permitting an assignee of a debt to sue is open to the same criticism as permitting a stranger to sue; and that if there is a contractual relation between me and the assignee of the debt of my creditor, so there is a contractual relation between me and parties who undertake to make a contract for my benefit. But there is this fundamental difference, that in the first case I part with a portion of my liberty to my creditor knowing the law to be that he can assign his claim over me to a stranger; in the second case I do not part with my liberty at all.—It is also to be remembered that if A. and B. intend to establish a contractual relation with C., the proper way to exhibit that intention would be for them to see C., and to get him to join in the contract. That he is not appealed to, when it would be easy to obtain

¹ *Payne v. Cave*, 3 T. R. 148; *Cooke* 3 Man. & R. 97; *Martin v. Mitchell*, 2 v. Oxley, 3 T. R. 653; *Head v. Diggon*, Jac. & W. 413; *supra*, § 2.

his assent if really desired, affords a strong inference that the parties did not desire his assent.

§ 788. It is agreed on all sides that on a deed *inter partes* none but parties can sue. If the deed, in other words, on its face restricts its parties to "A. of the first part and B. of the second part," C. cannot sue thereon, even though the contract purport to have been made for his sole advantage, and contain an express covenant with him for his benefit.¹ An action on a policy of marine insurance, however, can be brought, either by the broker who negotiated it, provided he be the ostensible party, or by the party interested.² A bond, also, payable to B. or C. may be sued on by B.;³ and a party designated in a composition deed, as beneficially interested, there being a several covenant with him by the debtor, may sue on the deed.⁴

§ 789. On a deed poll, in which the promisee is not formally named as a party to the deed, but appears only as recited either specially or as one of a class in the body of the deed, the promisee, if complying with the conditions of the deed, or otherwise contributing a sufficient consideration, is entitled to bring suit.⁵ When a policy of insurance is issued as a deed poll, in which the insurers covenant to pay the loss insured against, without specifying the covenantee by name, all persons interested in the insurance and on behalf of whom it is made may sue on the covenant.⁶ But the party suing must in such cases sue sub-

¹ Ch. on Pl. 16th Am. ed. (1879) 4; *Offly v. Ward*, 1 Lev. 235; *Bushell v. Beavan*, 1 Bing. N. C. 120; *Chesterfield Co. v. Hawkins*, 3 H. & C. 677; *Storer v. Gordon*, 3 M. & S. 308; *Barford v. Stuckey*, 2 B. & B. 333; *Berkeley v. Hardy*, 5 B. & C. 355; *Hinkley v. Fowler*, 15 Me. 285; *Sanders v. Filley*, 12 Pick. 554; *Northampton v. Elwell*, 4 Gray, 81; *Hornbeck v. Westbrook*, 9 Johns. 73; *Hornbeck v. Sleght*, 12 Johns. 199; *Spencer v. Field*, 10 Wend. 87; *Robbins v. Ayres*, 10 Mo. 538.

² *Sunderland Ins. Co. v. Kearney*, 16

Q. B. 925; *Lazarus v. Ins. Co.*, 5 Pick. 76; *Rider v. Ins. Co.*, 20 Pick. 259; see Ch. on Con. 11th Am. ed. 77.

³ *White v. Hancock*, 2 C. B. 830.

⁴ *Gresty v. Gibson*, L. R. 1 Ex. 112; *Reeves v. Watts*, L. R. 1 Q. B. 412; *Frost v. Gage*, 1 Allen, 262; cited Ch. on Con. 11th Am. ed. 78; *Leake*, 2d ed. 445.

⁵ *Leake*, 2d ed. 143, 445; Ch. on Con. 16th Am. ed. (1879) 4; *Platt on Covenants*, 513; *Chaplain v. Canada*, 8 Conn. 286.

⁶ *Sunderland Ins. Co. v. Kearney*, 16 Q. B. 925.

ject to all the limitations expressed in the deed.¹ And a deed poll to C. for the benefit of D. cannot be sued on, at least according to the rule prevailing in Massachusetts and England, by D.²—As has been already seen, it has been held in several states, that acceptance of a deed poll containing a recital that the land conveyed is subject to a mortgage, which the grantee agrees to pay, imposes a duty on the grantee to pay the mortgage and raises an implied promise on which a suit can be maintained.³

§ 790. It was stated at the beginning of this chapter, that by the English common law, a person cannot bring suit on a contract to which he is not a party. An exception to this rule is recognized in favor of children born of a marriage subject to a marriage settlement. The children born of such a marriage may sue under such a settlement; nor is it any defence that they were not in existence at the time of the settlement.⁴ And as a general rule, peculiar favor is extended by courts of equity to provisions made by parents for their children.⁵

Exception to general rule as to provisions for children.

§ 791. Another supposed exception is recognition of the liability of telegraph companies to parties receiving messages erroneously addressed or erroneously transmitted. In England this liability is denied in cases where the telegraph company is not the agent of the receiver of the message.⁶ In this country there is a concur-

Exception as to receiver of telegrams.

¹ *Macdonald v. Ins. Co.*, L. R. 9 Q. B. 328.

² *Sanders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Met. 167; *Flynn v. Ins. Co.*, 115 Mass. 449.

³ *Heim v. Vogel*, 69 Mo. 529; and cases cited *supra*, § 786.

⁴ *Gale v. Gale*, L. R. 6 Ch. D. 144; *Pollock*, 3d ed. 216. But see *Ross v. Milne*, 12 Leigh, 204.

⁵ *Pollock*, 3d ed. 216; citing *Cotton*, L. J., 15 Ch. D. 242.

⁶ *Dickson v. Tel. Co.*, L. R. 2 C. P. D. 62; L. R. 3 C. P. D. 1; *S. P. Playford v. Tel. Co.*, L. R. 4 Q. B. 706. In *Dickson v. Tel. Co.* the plaintiffs, mer-

chants of Valparaiso, received a message erroneously delivered to them by the company's agent, the message not having been intended for them, and not coming from the parties from whom it purported to come. It was held that the plaintiffs owed the defendant no duty arising from contract. "It is impossible to suppose," said Cotton, L. J., "that the company, in the ordinary course of their business, warrant that the message comes from a particular person, for they would thereby make a representation the truth of which in many cases they cannot ascertain."

rence of opinion to the effect that a telegraph company is liable to the receiver of a message which it erroneously transmits.¹ In some of these cases² the liability is placed on the ground of agency. The company is supposed to say to the receiver, "Will you pay me for this message if correct?" or, "Will you rely on the correctness of this message, and so far give me your patronage?" and the answer is, "I will!" Now, however strong the argument for agency may be in cases in which the receiver pays for the message, it fails where there is no payment, and where the sole relationship consists in the company sending the message to the receiver. A more reliable basis for the suit is that which is supplied by an appeal to the responsibility of the company on the principle *sic utere tuo ut non alienum laedas*. Electricity is as powerful an agent, in some aspects, as steam. If a railroad company is required to reimburse a party injured by its negligent abuse of steam power, it is proper that a telegraph company should be held liable to a party injured by its negligent use of electricity.³ If I am injured by the falling down of a building negligently erected on the land of A., it would be no defence to a suit brought by me against A. that the building was in the course of erection in pursuance of a contract between A. and B. If an apothecary negligently hands me poison, in consequence of which I am injured, it is no defence that this poison was made up for perfectly legitimate purposes, in pursuance of a contract between the apothecary and D. And if a telegraph company hands me a message by which I am injured, the fact that this is incidental to a contract between the company and the sender should constitute no defence.—Another state of facts, however, arises when the plaintiff's

¹ Elwood v. Tel. Co., 45 N. Y. 549; Minn. 155; De La Grange v. Tel. Co., 25 La. An. 383; Bank of Cal. v. Tel. Co., 52 Cal. 280. See 2 Thom. on Neg. 847-8; Ellis v. Tel. Co., 13 Allen, 226.
² See New York Tel. Co. v. Dryburg, 35 Penn. St. 303; De La Grange v. Tel. Co., 25 La. An. 383.
³ See Wh. on Neg. § 758; and see *infra*, § 812.

claim is the *non-delivery* of the message. In such case, unless this delivery be made obligatory by statute, the better opinion is that the only party who can sue for redress is the sender.¹

§ 792. Another apparent though not real exception is that of the consignee of goods, who, when beneficially interested, is entitled to sue the carrier. But, in point of fact, the cases in which this right is sustained are cases in which the consignee is the purchaser of the goods, and in which the consignor, in making the contract of carriage, does so as the consignee's agent.² Hence, "where there is no express agreement, the person at whose risk goods are carried is entitled to sue the carrier for their non-delivery. This person is generally the consignee, but may be the consignor."³ And, unless there is something to prove the contrary, the mere fact of delivery to the carrier of goods with the consignee's address indicates property in the consignee.⁴ But suit must be brought in the consignor's name when the property remains in him, as when the transfer is only on trial, or is void by the statute of frauds;⁵ and so when by an agreement between the parties no property is to vest in the consignee until delivery.⁶ And, in the absence of proof

Exception
as to con-
signee of
goods.

¹ See Wh. on Neg. §§ 439-41, 757; *infra*, § 812; *True v. Tel. Co.*, 60 Me. 9; *Parks v. Tel. Co.*, 13 Cal. 422. *Aliter* if delivery be a statutory duty; *West. Un. Tel. Co. v. Fenton*, 52 Ind. 1. In an ingenious article in the *American Law Review* for April, 1881, the American rulings are explained on the ground that the telegraph company contracts *with the sender for the benefit of the receiver*, as the latter's interest shall appear, to transmit the message, using due care, and, in case of negligence and damages resulting therefrom, to compensate the receiver if it is to him that the damages result. But to harmonize this position with the English and Massachusetts rulings it is necessary to view the sender as the receiver's agent in making the contract.

² See Dicey on Part. 87; Ch. on Pl.

16th Am. ed. (1879) 6; *Dutton v. Solomonson*, 3 B. & P. 584; *Dawes v. Peck*, 8 T. R. 330; *Lawrence v. Min-turn*, 17 How. U. S. 100; *Arbuckle v. Thompson*, 37 Penn. St. 170.

³ Dicey, *ut supra*, 89.

⁴ *Abbott on Ship*. 11th Eng. ed. 283; *Angell on Carriers*, § 495; *Chandler v. Sprague*, 5 Metc. 306; *Ludlow v. Bown*, 1 Johns. 1; *Potter v. Lansing*, 1 Johns. 215; *Griffith v. Ingle-den*, 6 S. R. 429.

⁵ *Chit. on Pl.* 16th Am. ed. 6; *Freeman v. Birch*, 1 Nev. & M. 420; *Duff v. Budd*, 3 B. & B. 183; *Norman v. Phillips*, 14 M. & W. 277; *Price v. Powell*, 3 Comst. 322.

⁶ *Stephenson v. Hart*, 4 Bing. 476; *Ilsey v. Stubbs*, 9 Mass. 65; *Blanchard v. Page*, 8 Gray, 281.

of property in the consignee, the consignor may maintain an action for the loss of the goods;¹ and so may any party having an interest in the goods.²

§ 793. A bill of lading is (1) a receipt from a carrier for goods to be delivered to a consignee or his assigns,³ and (2) a contract for the delivery of the goods as thus directed.⁴ In shipping contracts "three copies are made, each signed by the master—one is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to X., the consignee, who on receipt of it acquires a property in the goods which can only be defeated by the exercise of the vendor's equitable right of stoppage *in transitu*. The assignment of the bill of lading by endorsement by the consignee to a holder for value gives to that holder a better right than the consignee himself possessed. He has a title to the goods which overrides the vendor's right of stoppage *in transitu*, and gives him a claim to them in spite of the insolvency of the consignee and the consequent loss of the price of his goods by the consignor."— . . . The assignment of a bill of lading "transfers rights *in rem*, rights to specific goods, and these, to a certain extent, wider than those possessed by the assignor; therein it differs from negotiable instruments which only confer rights *in personam*." "But though the assignee is relieved from one of the liabilities of the assignor, he does not acquire proprietary rights independently of his assignor's title; a bill of lading stolen or transferred without the authority of the person really entitled, gives no rights even to a *bona fide* endorsee.⁵ And, again, the contractual rights conferred by statute are expressly conferred subject to

Bill of lading passes by indorsement.

¹ *Hand v. Baynes*, 4 Whart. 204.

² *Philadelphia Steamboat Co. v. Atkins*, 22 Penn. St. 522; *Hulse v. Young*, 16 Johns. 1.

³ See *Lickbarrow v. Mason*, 2 T. R. 63; *Berkeley v. Watling*, 7 A. & E. 39; *Ryberg v. Snell*, 2 Wash. C. C. 294; *Saltus v. Everett*, 20 Wend. 268; *Lawrence v. Minturn*, 17 How. U. S. 100; *Sanderson v. Lamberton*, 6 Binn. 129.

⁴ *Blanchet v. Collieries Co.*, L. R. 9

Ex. 74; *O'Brien v. Gilchrist*, 34 Me.

554; *Shepherd v. Naylor*, 5 Gray, 591;

Relyea v. New Haven Co., 42 Conn.

579; *Meyer v. Peck*, 33 Barb. 532;

McMillan v. R. R., 16 Mich. 79; *Ezell*

v. English, 6 Port. 311; *Wayland v.*

Mosley, 5 Ala., 430; *Bonner v. Marsh*,

10 S. M. & M. 376. As to distinction

between negotiability and assignability, see *infra*, § 838.

⁵ *Gurney v. Behrend*, 3 E. & B. 622.

equities. A bill of lading, then, may be called a contract assignable without notice, partaking in some respects of the character of conveyance, inasmuch as it gives a title to property, but incapable of giving a better title, whether proprietary or contractual, than is possessed by the assignor, subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee."¹ The transferee, therefore, who has made advances, and who takes from the designated owner, is beneficially interested in the goods, whether there be a special endorsement to him or not.² At common law he cannot in his own name sue the carrier, but must use the name of his assignor;³ but by statute in England, as we have seen, and in most jurisdictions in this country, bills of lading are made negotiable.⁴—It should be remembered that at common law the two offices of a bill of lading (*i. e.* the title it gives to the property as against the assignor, it being in this respect a sale, and the right of action it gives as against the carrier) are to be distinguished; and hence, unless there be an enabling statute, the assignee or endorsee should sue in the name of the party under whom he takes, and with whom the contract was executed.⁵—When a bill of lading is attached to a draft as a

¹ Anson, 217-8; Lickbarrow *v.* Mason, 2 T. R. 63; 6 East, 21 *n*; Jenkyns *v.* Osborne, 7 M. & G. 678; Leask *v.* Scott, L. R. 2 Q. B. D. 376; Glynn *v.* East India Dock Co., L. R. 5 Q. B. D. 129; Walter *v.* Ross, 2 Wash. C. C. 283; Allen *v.* Williams, 12 Pick. 297; Alderman *v.* R. R., 115 Mass. 233; Rawls *v.* Deshler, 3 Keyes, 572; Marine Bk. *v.* Wright, 48 N. Y. 1; Holmes *v.* Bank, 87 Penn. St. 525; Mich. Cent. R. R. *v.* Phillips, 60 Ill. 190; Law *v.* Hatcher, 4 Blackf. 364; Valle *v.* Cerre, 36 Mo. 575.

² Robinson *v.* Stuart, 68 Me. 61; Newcomb *v.* R. R., 115 Mass. 230; Hathaway *v.* Haynes, 124 Mass. 311; Emery *v.* Bank, 25 Oh. St. 360; Merchant's Bk. *v.* Hewitt, 3 Iowa, 103.

³ Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 297; Blanchard *v.* Page, 5 Gray, 297; Stollenwerck *v.* Thacher, 115 Mass. 224; Lineker *v.* Ayeshford, 1 Cal. 75.

⁴ See Short *v.* Simpson, L. R. 1 C. P. 248; Shaw *v.* R. R., 101 U. S. 557; Merchant's Bank *v.* R. R., 69 N. Y. 393.

⁵ *Ibid.*; Rowley *v.* Bigelow, 12 Pick. 314. That delivery without endorsement does not pass property in goods, see Stone *v.* Swift, 4 Pick. 389. That the consignor named in a bill of lading, though without property in the goods, can sue the carrier for injury to them, see Sargent *v.* Morris, 3 B. & Ald. 277; Blanchard *v.* Page, 8 Gray, 281.

security for its payment, it is an appropriation to the payee of the property described in the bill of lading, whether the latter be endorsed or not.¹—The unauthorized and surreptitious delivery of a bill of lading of goods which have never been in the carrier's possession, does not bind the carrier even to a *bona fide* holder.² And a transfer by one without any title to the goods passes no right to them to the transferee, even though he be a purchaser for value without notice.³

§ 794. A supposed exception, also, has been made in suits for money had and received, in which "it is not a rule of universal application that it is necessary to show privity in order to maintain an action."⁴ But actions of this class, when within the range of this exception, though nominally based on contract, are virtually equitable procedures for the execution of a trust. Hence, if money be remitted by A. to B. to pay C., and B. in any way, either expressly or by implication, acknowledges his indebtedness to C., he may be sued by C. in this form of action, a contractual relation being established between B. and C. And even though we reject this view, as might be the case in those states where the line between law and equity is still strictly maintained, yet the cases before us may still be explained, on common law principles, on the ground of agency. The defendant, when he receives money as the plaintiff's agent, is bound to account.⁵ But where A. pays money to B. for C.'s use, a suit to recover this money must be brought by B., unless (1) B. was agent for C., in which case C. can sue as principal, or (2) B. has undertaken with C. to hold the money for C.⁶

Exception
in suits for
money had
and re-
ceived.

¹ *Holmes v. Bailey*, 92 Penn. St. 57; *c. Campbell*, 55 N. Y. 462; *Farmers' Bk. v. R. R.*, 72 N. Y. 188, and other cases in Cent. L. J. Jan. 13, 1882.

² *Gurney v. Behrend*, 3 E. & B. 622; *Robinson v. R. R.*, 9 Fed. Rep. 129; *Stollenwerck v. Thacher*, 115 Mass. 224. where the authorities are carefully examined. See *supra*, §§ 182, 292, 734.

³ *Thompson v. Dominy*, 14 M. & W. 403; *Pease v. Gloahec*, L. R. 1 P. C. 219; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Shaw v. R. R.*, 101 U. S. 567; *Stollenwerck v. Thacher*, 115 Mass. 224; *Dows v. Cobb*, 12 Barb. 310; *Barnard v. Collins v. Brook*, 5 H. & N. 706.

⁵ *Supra*, §§ 722 *et seq.*, 786; *Lilly v. Hays*, 5 A. & E. 548; *Hall v. Marston*, 17 Mass. 575; *Mellen v. Whipple*, 1 Gray, 322; *Exchange Bank v. Rice*, 107 Mass. 41.

⁶ *Supra*, §§ 728, 736; *Dicey, ut supra*, 93.

“If a debtor, by an order given to his agent, appropriates a fund in his hands to the discharge of the debt, and the agent pledges himself to the creditor so to appropriate the fund, the order is irrevocable, and the creditor may sue such agent.

. . . But the creditor cannot sue the agent unless the latter has assented to the appropriation so as to pledge himself to the creditor; for otherwise the debtor may countermand the order, and there is no privity between the creditor and the agent.”¹ Supposing the creditor accepts the substitution, this amounts to novation,² and the consideration is not merely the advantage to the creditor from the substitution of a new debtor (as Mr. Dicey seems to think), but the relief of the original debtor. “I will relieve the original debtor if you will take his place.”³—Supposing, also, money is sent to D. by B. a debtor of A., with instructions to D. to send the money to A., and D. advises A. to this effect and promises to pay A., this establishes a contractual relation between A. and D.; in other words, in such a case the original creditor may sue the depository of the money on his promise to pay it over.⁴ And when money is deposited by a debtor with his agent to be paid to the creditor, of which the creditor is advised, it may be now considered settled that the creditor can sue the agent.⁵—Under the same form of action, the party equitably privileged may sue for money which the defendant has improperly received. “Where money has got into the hands of a party by means of some tortious act, this action will lie at the instance of the real owner of the money.”⁶ This includes cases in which the defendant has in his hands money which in equity belongs to the plaintiff, but which is wrongfully withheld.

¹ *Forth v. Stanton*, 1 Wms. Saund. 210 *b*, note (a); and see *Howell v. Batt*, 5 B. & Ad. 506, and for other cases see *supra*, § 728.

² *Infra*, § 852.

³ Dicey, *ut supra*, 94. See *Williams v. Everett*, 14 East, 582, for a case in which the party receiving the money was held not to hold it in trust for a party designated as beneficiary. That assent on the part of A. to hold money

for B.'s use gives B. a right of action, see *Lilly v. Hays*, 5 A. & E. 548.

⁴ *Lilly v. Hays*, 5 A. & E. 548; *Ephraïms v. Murdock*, 7 Blackf. 10; *infra*, § 852; and see criticism, *supra*, § 786.

⁵ *Wh. on Agency*, §§ 443, 541; *Hall v. Marston*, 17 Mass. 575; *Frost v. Gage*, 1 Allen, 262; *Dow v. Clark*, 7 Gray, 198; see *supra*, § 786.

⁶ *Crompton, J., Collins v. Brook*, 5 H. & N. 706.

In such cases, "the law creates the privity and implies the promise."¹—But apart from such cases of tortious withholding, in cases in which the "promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name, on the promise made to his agent."²

§ 795. Negotiable paper, also, establishes a liability from the party bound to the holder, although the latter acquired no title until long after the former became bound.³ The engagement of the party so bound is "I will pay the amount to whomsoever may happen to hold the paper on its maturity."⁴ A cheque, also, with a blank left for the payee's name, which the holder is entitled to fill in, binds the maker to whomsoever may be thus designated, though unknown to the maker at the time the check was drawn.⁵ A bill of exchange, also, though incomplete from the want of a payee, becomes operative as soon as the name of the payee is supplied, though this is not until after it is signed and put in circulation by the drawer.⁶ And, as a general rule, the signing and delivering of negotiable paper imparts authority to the party to whom it is given to fill up its blanks.⁷ But negotiable paper must have a certain payee, either named on its face, or to be hereafter individuated by the fact that he becomes the holder or "bearer" of the paper. If the payee (in cases where designation is attempted) be named in the alternative,⁸ or be named

Negotiable paper establishes liability to holder though unknown at the time of making.

¹ Morton, J., *Putnam v. Field*, 103 Mass. 557; *Bigelow, J., Brewer v. Dyer*, 7 Cush. 340; *Goodenow, J., Stimson v. Ins. Co.*, 47 Me. 385; and see *supra*, §§ 724 *et seq.*

² Gray, C. J., in *Exchange Bank v. Rice*, 107 Mass. 43; citing *Sims v. Bond*, 5 B. & Ad. 389; 2 Nev. & M. 608; *Huntington v. Knox*, 7 Cush. 371; *Barry v. Page*, 10 Gray, 398.

³ As to distinction between assignability and negotiability, see *infra*, § 838.

⁴ See *Willans v. Ayers*, L. R. 3 Ap. Ca. 133; *Brown v. De Winton*, 6 C. B. 336; *Brandao v. Barnett*, 12 Cl. & F.

787; *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 How. 343; *Hotchkiss v. Banks*, 21 Wall. 354; *Smith v. Livingston*, 111 Mass. 342; *Dutchess Co. Ins. Co. v. Hackett*, 73 N. Y. 226. See *supra*, § 24.

⁵ *Byles on Bills*, 9th ed. 3, 146; *Rouquette v. Obermann*, L. R. 10 Q. B. 525.

⁶ *Leake*, 2d ed. 437; *McCall v. Taylor*, 19 C. B. N. S. 301; *Stoessiger v. R. R.*, 3 E. & B. 549.

⁷ *Byles on Bills*, 9th ed. 84, 181; *Russel v. Langstaffe*, Dougl. 514; *Hayward ex parte*, L. R. 6 Ch. 546.

⁸ *Storm v. Stirling*, 3 E. & B. 832.

so ambiguously as to make him incapable of positive identification,¹ the paper cannot be sustained.² If the alleged maker's name is forged, then, no matter how honest may have been the purchase by the holder, he cannot recover.³—The holder of non-negotiable paper cannot sue the endorsers in his own name.⁴

§ 796. Even though a security be not on its face negotiable, a party who sells it for value cannot set up secret equities against a *bona fide* holder. And a party who entrusts such a document for sale to a broker without notice is estopped from setting up his title against parties taking such security in good faith and for value from the broker.⁵

Party may be estopped from denying liability.

§ 797. It will be hereafter considered how far parties issuing bonds may contract that they shall be free from equities.⁶ Whether there is such an intention is to be determined, under the applicatory law, by the document itself, aided, as to latent ambiguities, by extrinsic proof.⁷ In this country, bonds issued by corporations are regarded as transferable free from equities;⁸ and the purchaser for value, without notice, of a coupon bond, payable to bearer, may sue on it in his own name unaffected by the equities of prior holders.⁹—As negotiable instruments are regarded in England, scrip issued provisionally by the agents of a foreign government, preliminary to the issue of bonds;¹⁰ and “such bonds or scrip, and other foreign instru-

Whether bonds are negotiable depends upon terms of document.

¹ *Cowie v. Stirling*, 6 E. & B. 333.

² See *Yates v. Nash*, 8 C. R. N. S. 851; *Leake*, 2d ed. 437.

³ *Pollock*, 3d ed. 236; *Robbett v. Pinkett*, L. R. 1 Ex. D. 368; *Carpenter v. Bank*, 123 Mass. 66; *Colson v. Arnot*, 57 N. Y. 253; *Buckley v. Bank*, 35 N. J. L. 400; see *supra*, § 744.

⁴ *Birleback v. Wilkins*, 22 Penn. St. 26; see *infra*, § 841.

⁵ *Infra*, § 846; *Goodwin v. Roberts*, L. R. 1 Ap. Ca. 486; *South Ottawa v. Perkins*, 94 U. S. 260; *Cowdrey v. Vanbenburgh*, 101 U. S. 572; *Jarvis v. Rogers*, 13 Mass. 105; *Society for Savings v. New London*, 29 Conn. 174; *McNeil v. Bank*, 46 N. Y. 325; *Mer-*

chants' Bank v. Livingston, 74 N. Y. 223; *Combs v. Chandler*, 33 Oh. St. 178. See *Wh. on Ev.* § 1147; *Bigelow on Est.* 452–67; and as to corporations see *supra*, § 141.

⁶ *Infra*, § 846.

⁷ *Infra*, § 843.

⁸ See *supra*, §§ 138 *et seq.*; *infra*, § 846; *Mercer Co. v. Hackett*, 1 Wall. 83; see *Green's Brice's Ultra Vires*, 268.

⁹ *Fox v. Iron Co.*, 17 Leg. Int. 149. Coupons payable to bearer may be sued on by the holder separately from the bonds. *Beaver Co. v. Armstrong*, 44 Penn. St. 63.

¹⁰ *Goodwin v. Roberts*, L. R. 10 Ex. 76; *aff. in Ex. Ch.* L. R. 10 Ex. 33;

ments negotiable by the law of the country where they are made, may be recognized as negotiable by our courts, though they do not satisfy all the conditions of an English negotiable instrument."¹ The law of the place of payment, in such cases, determines the forms of demand and protest.²—Irrespective of the question of negotiability, the assignee of a bond is in most states entitled to bring suit on it in his own name. This, however, does not involve negotiability so as to free the holder from equities attaching prior to notice of the assignment.³ But to entitle the assignee of a railroad bond, payable to W. F., or assigns, to sue on such bond, he must prove endorsement or assignment in writing to him from W. F.⁴ "No doubt," said the court, "this bond was assignable in law so as to authorize the assignee to sue in his own name under the provisions of the act of May 28th, 1715, and it is conceded that it might have been assigned in equity by a parol delivery, but then the action must be in the name of the obligee."⁵ Railroad bonds payable to bearer, however, may be sued on by the holder.⁶—Mint certificates, though they may be assignable, are not regarded as negotiable,⁷ nor are certificates of deposits in savings funds.⁸ The form of assignments, as a rule, is to be determined by the *lex fori*.⁹

§ 797 a. Another exception is to be found in the case where a contract is made with the intention of injuriously affecting a third party. When this is done, such third party, if injured, may obtain redress from the wrong-doer.¹⁰ This, however, is not by a contractual suit, but by a suit for tort.

Exception
as to party
on whom
wrong is
inflicted.

in House of Lords, L. R. 1 Ap. Ca. 476.

¹ Pollock, 3d ed. 238, citing Crouch v. Credit Foncier, L. R. 8 Q. B. pp. 384-5; Goodwin v. Roberts, L. R. 1 Ap. Ca. 476; see *infra*, § 846.

² Wh. Con. of Laws, § 454; Rothchild v. Currie, 1 Q. B. 45; Horne v. Rouquette, L. R. 3 Q. B. D. 514; Cox v. Nat. Bank, 100 U. S. 704.

³ Franks v. Brown, 17 S. & R. 290;

Hodgdon v. Naglee, 5 W. & S. 217; Lightly v. Brenner, 14 S. & R. 127.

⁴ Bunting v. R. R., 81 Penn. St. 254. See *infra*, § 841.

⁵ Licey v. Licey, 7 Barr, 251.

⁶ Carr v. Le Fevre, 27 Penn. St. 413.

⁷ Hegeman v. McCall, 1 Phila. 531.

⁸ London Saving Fund v. Bank, 36 Penn. St. 498.

⁹ *Infra*, § 841.

¹⁰ See *supra*, § 237.

§ 798. It has already been noticed that many of the cases in which persons who were at one time strangers to a contract are held entitled to sue on such contract are to be explained on the ground of a novation by which such persons become parties to the contract. To constitute such novation it is essential (1) that the creditor should assent, on a sufficient consideration, to accept the new debtor, and (2) that the new debtor should assent, on a sufficient consideration, to be bound.¹

Novation
requires
creditor's
assent.

§ 799. A *cestui que trust*, no matter how exclusively the beneficial enjoyment of a contract is vested in him, cannot sue on it unless he is a party to the contract either in name or through an agent. If he could, it could be only on assumption of a contractual relation, which, were it recognized on principle, would enable any two persons to put a third on business relations with them whether he would or not.² But while a *cestui que trust* cannot, without becoming a party to a contract, sue on it, he may compel his trustee to sue; or may, in a court having equitable jurisdiction, use the trustee's name for the purpose of bringing suit.³ "This rule could not be disregarded without destroying the fundamental distinction between courts of law and courts of equity with regard to the remedy peculiar to each jurisdiction; if the *cestui que trust* were permitted to sue at law in his own name, the benefits intended to result from the intervention of a trustee clothed with a legal title might be lost, and the advantages arising from giving courts of equity exclusive control over matters of trust would be defeated."⁴—When the suit is brought in the trustee's name, a third party cannot set up against it the title of the *cestui que trust*.⁵

Cestui que
trust can-
not sue
unless
party.

¹ See *infra*, §§ 852 *et seq.*; and see Conquest's case, L. R. 1 Ch. D. 334.

² *Supra*, § 787; Ch. on Pl. 16th Am. ed. (1879) 2; *How v. How*, 1 N. H. 49; *Montague v. Smith*, 13 Mass. 404; *Treat v. Stanton*, 14 Conn. 445.

³ *Piercy ex parte*, L. R. 9 Ch. 43; *Pigott v. Thompson*, 3 B. & P. 147; *Berry v. Gillis*, 17 N. H. 9. That in

equity a trustee must join party having beneficial interest, see *Dunn v. Seymour*, 11 N. J. Eq. 220; and that the party beneficially interested may sue in his own name, see *Burlew v. Hillman*, 16 N. J. Eq. 23.

⁴ Ch. on Pl. 16th Am. ed. (1879) 3; see *Barndollar v. Tate*, 1 S. & R. 160.

⁵ *Huston v. Wickerham*, 8 Watts,

§ 800. A contract implies the consent of two parties,¹ but it does not follow that both parties should be known at the time of the proposal to each other. One may be indeterminate at the time the proposal is made, and the proposal may remain open, so far as the promisee is concerned, until the contingency happens by which he is individuated. The proposal in such case establishes a contractual relation with all who take action in submission to its terms.² Hence a written promise by a colliery agent, addressed to whomsoever should apply, to load a ship on specific terms, binds the promisor to a master of a ship who chartered the ship on the faith of the promise.³ Under the same head may be mentioned railroad time-tables which bind the companies to parties taking action under such time-tables.⁴

§ 801. As additional illustrations of this rule may be noticed offers of rewards, by which persons desiring to have certain services rendered offer a specific sum to those persons who should render such services. Who the persons in question will be is not known by the promisor at the time of making the promise.⁵ A letter of credit, also, binds the party issuing it to all bankers who may advance money on the faith of it. The holder of the letter takes it to any bankers whom he may select, provided he be not limited in the letter, and the bankers who advance money on the faith of the letter become the promisees under the letter. When the proposal is taken up by a banker acting on the letter, then the contract is complete.⁶ The same distinction is applicable to offers of sale at auction. The *proposal* is made when the article is put up for sale. The *acceptance* is

Plaintiff
may depend
for ascer-
tainment
on contin-
gency.

Illustrated
by offers of
rewards,
circular
letters, and
auction
sales.

519; *McHenry v. McCall*, 10 Watts, 456; *Lair v. Hunsicker*, 28 Penn. St. 115.

¹ *Supra*, § 2.

² *Supra*, § 24; *Leake*, 2d ed. 436; *Tooley v. Comstock*, 45 Mich. 603; *supra*, § 786.

³ *Weidner v. Hoggett*, L. R. 1 C. P. D. 533.

⁴ *Supra*, § 25. Mr. Pollock, 3d ed. 204, lays it down categorically that

"the original parties to a contract must be persons ascertained at the time when the contract is made."

This is to be taken subject to the qualification in the text. "The contract is not made" until the acceptance. *Windscheid*, ii. § 309.

⁵ *Supra*, §§ 24-26.

⁶ *Supra*, § 25 a; *Asiatic Banking Co. ex parte*, L. R. 2 Ch. 391.

when the hammer falls; and at this moment the contract is complete.¹ But that there is no contract until there is an acceptance by a definite person is illustrated by other recent rulings. In one case it was held that the mere fact that an auctioneer in good faith advertises a sale of certain goods, does not bind him to parties attending the sale that the sale shall actually take place.² In another case it was held that the offer of stock in trade by tender does not amount to a contract to sell the stock to the person making the highest tender.³ Yet we can readily conceive of cases in which the auctioneer might create a binding contract by a general proposal. Suppose he should say, "if you put up a deposit," or "if you will give up another purchase you have in view," then the handing in the deposit, or the giving up the other purchase, would be a consideration which would bind the vendor.⁴

§ 802. A principal, whose existence as such was not known to the other party at the time of making the contract, can sue on the contract, and this apparently militates against the rule above stated that privity of contract is necessary to enable a party to maintain suit. But it must be remembered that the rule is, not that the plaintiff and the defendant should have contracted with each other personally, but that the plaintiff should come within the range of parties to whom the defendant agreed to perform certain services. If I deal with A., I may be readily understood to deal, under certain limitations, with the parties whom A. represents. The limitations are that any equities I may have, in the way of set-off or counter-claim, against A., I am to have against the principal whom A. represented, supposing that when I dealt with A. I believed I was dealing with a principal.⁵

Principal,
though un-
disclosed,
can sue.

¹ *Supra*, § 25 b.

² *Harris v. Nickerson*, L. R. 8 Q. B. 286.

³ *Spencer v. Harding*, L. R. 5 C. P. 561.

⁴ This would explain *Denton v. R. R.*, 5 E. & B. 860, more satisfactorily than it is explained by Mr. Pollock (3d ed. 14). A railroad company is not

liable to me on its time-table simply because I say "I will take your offer." If, however, by relying on the time-table, I suffer some detriment, then the company is liable.

⁵ Wh. on Ag. §§ 405, 466, 722-741. As to set-offs, see *infra*, §§ 1021, 1023. That undisclosed principal may be sued, see *infra*, §§ 810, 810 a.

§ 803. It is competent to explain by parol evidence a latent ambiguity as to a name, as where a name is misspelt, or where one name is inserted when another is meant, or where for business purposes a name other than that of the actual party is used.¹ Thus, where a deed was made with the "City Investment Company," it was held admissible to show that this company consisted of two persons, who were entitled to sue on the deed.² It is also admissible to introduce evidence to identify grantee or assignee,³ and to prove who is the buyer and who the seller in a memorandum or note under the 17th section of the statute of frauds.⁴

§ 804. When a deed is executed for the benefit of certain persons, who are designated by the title of some office or relationship they hold and not by their real names, and when those persons do or suffer something in return which forms a sufficient consideration, parol evidence is admissible to identify them, and they are entitled to sue in their own names.⁵ This has been held to be the rule in cases where parties are described as "executors" of another, all the executors being entitled to join as parties,⁶ and where they are described as "creditors," coming in and proving their debts as such.⁷ Where, also, a contract of sale describes the vendors as "proprietors," they may be identified and may sue in their own names;⁸ and so where they are described as

Real parties may be proved by parol.

Office or relationship may be thus explained.

¹ *Supra*, § 202; *Spurr v. Cass*, L. R. 5 Q. B. 656; *Kell v. Nainby*, 10 B. & C. 20; *Moller v. Lambert*, 2 Camp. 548; *Lancey v. Ins. Co.*, 56 Me. 562; *Foster v. McGraw*, 64 Penn. St. 464; *Richmond R. R. v. Snead*, 19 Grat. 354; *Nixon v. Cobleigh*, 52 Ill. 387; *Scammon v. Campbell*, 75 Ill. 223; *Bancroft v. Grover*, 23 Wis. 463; *Ellis v. Crawford*, 39 Cal. 523; and cases cited *supra*, § 202, where other distinctions are noticed.

² *Maugham v. Sharpe*, 17 C. B. N. S. 443.

³ *Langlois v. Crawford*, 59 Mo. 456; see *supra*, § 202.

⁴ *Wh. on Ag. §§ 719 et seq.; supra*, § 202; *Newell v. Radford*, L. R. 3 C. P. 52. That a party is bound by a contract he executes under an assumed name, see further *Richardson's case*, L. R. 19 Eq. 588; *Gould v. Barnes*, 3 Taunt. 504.

⁵ *Supra*, § 202.

⁶ *Hood v. Barrington*, L. R. 6 Eq. 218; *McClean v. Kennard*, L. R. 9 Ch. 336.

⁷ *Gresty v. Gibson*, 4 H. & C. 28; *Reeves v. Watts*, L. R. 1 Q. B. 412.

⁸ *Supra*, § 202; *Sale v. Lambert*, L. R. 18 Eq. 1; *Commins v. Scott*, L. R. 20 Eq. 11.

"trustees under a trust for sale."¹—A mere description as "vendors" is not by itself sufficient for identification.²

§ 805. Since it is necessary to constitute a contract that there should be two parties, an engagement by which a party undertakes with himself to do a particular thing cannot be called a contract.³ There cannot, therefore, be a freight contract, in the proper sense of the term, when a ship owner carries his own goods in his ship.⁴ Where an insurance company, also, had two departments, one for insurance technically and the other for the granting of annuities, it was held that one department could not insure the other, and that such an insurance was void.⁵ A party, also, buying a judgment against himself extinguishes the judgment, and a mortgagee purchasing the equity of redemption extinguishes the mortgage.⁶

Party cannot contract with himself.

§ 806. The fact that other parties are joined in a joint indebtedness makes no difference, if striking out such other parties, the plaintiff would be virtually suing himself. The debtors are liable jointly, and extinguishing the debt as to one extinguishes it as to all.⁷ Hence it has been held that a note payable to the order of several persons, and endorsed by them to one of their number, was defectively endorsed, "for it is impossible for a person to sue himself, whether alone or jointly with others."⁸ It is otherwise, however, when a note is made by several persons jointly and *severally*. In such case "it is no answer to an action upon the several liability of one that the payee was one of the joint makers."

Joining other parties makes no difference.

¹ Leake, 2d ed. 487, citing *Catling v. King*, 46 L. J. C. 384.

² *Potter v. Duffield*, L. R. 18 Eq. 4.

³ *Miller v. Woodfall*, 8 E. & B. 493; *Gumm v. Tyrie*, 4 B. & S. 680; *Faulkner v. Lowe*, 2 Ex. 595. That one party cannot sign as the other party's agent, see *Sharman v. Brandt*, L. R. 6 Q. B. 720.

⁴ Leake, 2d ed. 438; *Gumm v. Tyrie*, 4 B. & S. 680; *Mercantile Bk. v. Gladstone*, L. R. 3 Ex. 233; see *Keith v.*

Burrows, L. R. 2 C. P. D. 163, L. R. 2 Ap. Ca. 636.

⁵ *Grey v. Ellison*, 1 Giff. 838.

⁶ *Toulmin v. Steere*, 3 Mer. 210; see *Higgen's case*, 6 Co. 44b; *King v. Hoare*, 13 M. & W. 504.

⁷ Leake, 2d ed. 439; *Moffat v. Van Millingen*, 2 B. & P. 124 n.; *De Tastet v. Shaw*, 1 B. & Ald. 664.

⁸ Leake, 2d ed. 439; citing *Mainwaring v. Newman*, 2 B. & P. 120.

⁹ Leake, 2d ed. 440, citing *Beecham*

§ 807. Although in equity a partner can call upon his co-partners to account, he cannot at law sue the partnership;¹ the principle being that there can be no contract between a party and himself jointly with others.² Nor can there be, at law, a contract between two partnerships which have a member common to both.³—Where, after a marriage, the fathers of the husband and wife agreed to pay a specific allowance to the husband, and agreed, also, that the husband should have the right to sue for this allowance, it was held that the husband, who was not a party to the agreement, could not maintain on it a suit.⁴

§ 808. If a company passes a resolution to employ an officer at a salary, and he negotiates with the company for the salary, agreeing to give his time for the salary, he can sue the company for the salary. But if there is merely a resolution adopted by the company that a particular person shall receive certain emoluments, he cannot sue for such emoluments until he has entered into contractual relations with the company; nor can he sue for a wrongful dismissal.⁵ And articles of association that a mine is to be purchased at a certain price will not, without any negotiations between the parties, sustain a suit by the owner of the mine against the company.⁶—When, however, the members of an association agree to subscribe certain sums to further a common object, and appoint a committee to collect the subscriptions due, the committee are entitled to sue for the subscriptions.⁷

v. Smith, E. B. & E. 442. Joint and several covenants may be in like manner severed. *Rose v. Poulton, 2 B. & Ad. 822.*

¹ *De Tastet v. Shaw, 1 B. & Ald. 669; Morris's Est., L. R. 10 Ch. 68.*

² *Leake, 2d ed. 440; Worrall v. Grayson, 1 M. & W. 166; Holmes v. Higgins, 1 B. & C. 74; Harvey v. Kay, 9 B. & C. 356.*

³ *Ibid.; Bosanquet v. Wray, 6 Taunt. 597.*

⁴ *Tweddle v. Atkinson, 1 B. & S. 393; see this case discussed, supra, §§ 784 et seq.*

⁵ *Eley v. Assurance Co., L. R. 1 Ex. D. 88; see also Melhado v. Porto Alegre R. R., L. R. 9 C. P. 503.*

⁶ *Pritchard's case, L. R. 8 Ch. 956.*

⁷ *Carr v. Bartlett, 72 Me. 121; cited in full, supra, § 528; Curry v. Rogers, 21 N. H. 247; Thompson v. Page, 1 Met. (Mass.) 565; Ives v. Sterling, 6 Met. (Mass.) 310; Watkins v. Eames, 9 Cush. 537; Athol Music Hall v. Carey,*

II. DEFENDANTS.

§ 809. Not only is the assent to a contract of the party charged necessary to bind him, but this assent must be coincident with the formation of the contract. Assent of party charged necessary to bind him. It is true that a stranger may be liable in tort for wrongfully and maliciously procuring the breach of a contract,¹ but this is a liability not on a contract, but outside of the contract.² As a rule, a party, to be made liable on a debt, must assent to such liability.³ "A. cannot by paying X.'s debts unasked," says Sir W. Anson,⁴ "make X. his debtor," and he adopts, as settled by high authority,⁵ the rule that a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor. "A voluntary payment made by one of a debt due by another, without his request, creates no assumpsit or liability on the part of the latter to the former."⁶—In this relation may be considered the cases heretofore noticed⁷ where vendees of mortgaged property agree to pay the mortgage debt. "If B. as grantee accepts a deed from A. containing a recital that the property was conveyed subject to a deed of trust made to secure a debt to C., and that B. assumed or agreed to pay the same, the effect of such a recital is to make the debt due to C. the debt of B., and to render B. personally liable therefor; by the acceptance of the deed a duty is imposed upon B. and the law implies a promise that he will perform it, on which in case of failure assumpsit will lie."⁸

116 Mass. 471. As to privity of contract, see *supra*, § 506.

¹ Wh. on Neg. § 441; *Lampleigh v. Brathwait*, 1 Smith, L. C. 7th Am. ed. 280; *Lunley v. Gye*, 2 E. & B. 216; *Young v. Brander*, 8 East, 12; *Bowen v. Hall*, L. R. 6 Q. B. D. 333.

² Wh. on Neg. § 441; *Pollock*, 3d ed. 209.

³ *Supra*, §§ 1 *et seq.*, 506, 784; *Strawn v. O'Hara*, 86 Ill. 53.

⁴ Cont. 197.

⁵ *Durnford v. Messeter*, 5 M. & S. 446.

⁶ *Hearn v. Cullen*, 54 Md. 543; *Bartol*, C. J., citing *Mayer v. Hughes*, 1 G. & J. 480. As to assignees, see *infra*, § 836.

⁷ *Supra*, § 786 *a*.

⁸ *Norton, J., Wiggins Ferry Co. v. R. R.*, 73 Mo. 403; citing *Heim v. Vogel*, 69 Mo. 529; *Pitcher v. Swift*, 21 Vt. 298, citing *Aikins v. R. R.*, 26 Barb. 289; *Attix v. Pelan*, 5 Clark, Iowa, 336; *Burton v. Wills*, 30 Miss. 689; see to same effect, 1 Jones on Mortgages, § 756; *Conover v. Brown*, 29 N. J. Eq. 510.

§ 810. On the principle *expressio unius est exclusio alterius* the enumeration of specific parties in a contract excludes the supposition of others,¹ unless one of the named parties be shown to have acted for an undisclosed principal.² “Where there is such a deed as is technically called a deed *inter partes*, that is, a deed importing to be between the persons who are named in it, as executing the same, and not, as some deeds are, general to ‘all people,’ the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger can take, except by way of remainder, nor can any stranger sue upon any of the covenants it contains.”³ To admit evidence to introduce a new party into a contract, would be to vary the contract essentially; and such evidence, unless for the purpose of explaining a latent ambiguity, or of disclosing a real principal, is inadmissible.⁴ Parol evidence, however, is admissible, as is elsewhere seen more fully, to bring out the real name of a party,⁵ and to remove latent ambiguity as to the designation of parties.⁶

§ 810 a. So far as concerns the respective liabilities of principal and agent on paper executed by the latter, the distinctions are obvious.⁷ A person who defines himself in a negotiable note or bill as treasurer or agent of a designated corporation, and signs the paper as such, binds not himself but the corporation.⁸ But it is otherwise where the party signs simply as

Illustrated
in case of
agents
signing in
their own
names.

¹ Leake, 2d ed. 444; Dicey, *ut supra*, 225; Southampton v. Brown, 6 B. & C. 718; Chesterfield Colliery v. Hawkins, 3 H. & C. 677; Hartzell v. Saunders, 49 Mo. 433; *supra*, § 674.

² Wh. on Agency, §§ 464; *supra*, § 802; *infra*, § 811.

³ Storer v. Gordon, 3 M. & S. 322; citing 2 Inst. 673; *supra*, § 788.

⁴ Leake, Cont. 2d ed. § 446; State v. Nashville, 2 Tenn. Ch. 755.

⁵ Nixon v. Cobleigh, 52 Ill. 387; Aultman v. Richardson, 7 Neb. 1.

⁶ See *supra*, § 804.

⁷ See *supra*, §§ 134, 802.

⁸ Lindus v. Melrose, 3 H. & N. 177; Bowen v. Morris, 2 Taunt. 374; Mann v. Chandler, 9 Mass. 335; Fiske v. Eldredge, 12 Gray, 474; Mott v. Hicks, 1 Cowen, 513; Brockway v. Allen, 17 Wend. 40; Lazarus v. Shearer, 2 Ala. N. S. 718; Hawk v. Marion Co., 48 Iowa, 472. In Simpson v. Garland, 72 Me. 40, the note read as follows: “1000, Carmel, April 22, 1877, for value received, we, the subscribers for Carmel Cheese Manufacturing Co., promise to pay William Simpson, or order, one thousand dollars in six months from date with interest. F. A. Simp-

agent,¹ and where the note can only be made operative by charging the party signing.² Liability attaches, also, to a

son, Rufus Work, A. S. Garland." It was held the note was the note of the Carmel Cheese Manufacturing Co. and not that of the signers, it appearing that the signers were directors of the company, and authorized to make the note for the company, and that it was given for money appropriated for the use of the company.

"The defendants," so it was said in the opinion of the court, "sign their own names only; but in the body of the note they say, 'we, the subscribers, for the Carmel Cheese Manufacturing Company, promise to pay.' If the words 'for the Carmel Cheese Manufacturing Company,' had been omitted from the body of the note, and had been written against the defendant's signatures, the authorities are quite uniform that the note would be the note of the company, and not of the defendants. *Sturdivant v. Hull*, 59 Maine, 172; *Atkins v. Brown*, id. 90; *Sheridan v. Carpenter*, 61 id. 83; *Winship v. Smith*, id. 121; *Ballou v. Talbot*, 16 Mass. 461; *Tucker Manufacturing Co. v. Fairbanks*, 98 id. 101; *Morell v. Codding*, 4 Allen, 403; *Draper v. Mass. Steam Heating Co.*, 5 id. 338.

"By the rule laid down in *Nobleboro' v. Clark*, *supra*, the words used in the body of the note tending to show the meaning of the parties, should have the same force and effect as if following, or written against the defendants' signatures. Their meaning is as significant in the one case as in the other." On the last point, however, see *Morell v. Codding*, 4 Allen, 403, *contra*. In *Mellen v. Moore*, 68 Me. 390, a note in the plural, "we promise," etc., signed "M. treasurer of the D. Association," was held to be the note of M. and not of the association.

¹ *Williams v. Robbins*, 16 Gray, 77; *Dubois v. Canal Co.*, 4 Wend. 285; *Quigley v. De Haas*, 82 Penn. St. 267; *Bickford v. Bank*, 42 Ill. 238; *Scott v. Baker*, 3 W. Va. 495.

² In *Wing v. Glick*, Sup. Ct. Iowa, 1881, the suit was on the following contract: "State of Iowa, County of Jones, Township of Hale. Mr. S. J. Wing, 132 South Clark Street, Chicago, Illinois. Dear Sir: Please deliver to W. H. Glick, at his residence, nine sets of national business and primary charts, at \$36 per set—\$324; and we agree to pay for said goods on the first day of March, 1879, with interest at six per cent. after due. W. H. Glick, President School Board. I. B. Southwick, Sec'y School Board." The defendants averred that the contract was not theirs, but the contract of the district township of Hale. But they were held liable personally. "It is well settled," so said Adams, C. J., "that where a person in executing a contract describes himself as agent without disclosing his principal, the contract becomes the personal obligation of the maker and no one else. *Kenyon v. Williams*, 19 Ind. 44. The case before us is not essentially different. The defendants describe themselves as officers, but the contract neither shows nor indicates the corporation of which they are officers. Some authorities have gone so far as to hold that the officer incurs a personal obligation, even where, in the description of himself, he fully sets out the corporation of which he is an officer. In *Ins. Co. v. Newhall*, 1 Allen, 130, the note upon which the action was brought was signed. 'Cheever Newhall, President of the Dorchester Avenue R. R. Co.' As the note con-

party signing as "executor of C. D.," he having no power as executor to issue paper.¹ It has also been held that the mere attaching of a title to the signer's name, such as "treasurer," or "director," does not itself shift the liability from the signer to the company of which he is the officer, unless in the body of the instrument he states that he signs for the company, or unless it should appear that he was known by the parties to be acting as agent for the company.² But it has been ruled to be otherwise when it is shown that the party signing has been in constant habit of signing notes in this way, which have been regularly paid.³—It follows, *a fortiori*, that the party signing is liable when there is no indication

tained no words in the body thereof purporting to bind the Dorchester Avenue Railroad Company, it was held to be the personal obligation of the maker. The same rule was held in *Fiske v. Eldridge*, 12 Gray, 476, where the note was signed: 'John S. Eldridge, Trustee of Sullivan R. R.;' and in *Sturdivant v. Hull*, 59 Me. 172, where the maker described himself as 'Treasurer of St. Paul's Parish;' and in *Barker v. Ins. Co.*, 3 Wend. 94, where the maker described himself as 'President of the Mechanics' Fire Ins. Co.;' and in *Powers v. Briggs*, 79 Ill. 493, where the makers described themselves as 'trustees of' a specified church; and in *Moss v. Livingston*, 4 Comst. 208, where an acceptor described himself as 'President of Rosendale Manufacturing Company.' See, also, *Hays v. Crutcher*, 54 Ind. 260; and *Gregory v. Leigh*, 33 Texas, 813. The defendants rely upon *Lacy v. Lumber Co.*, 43 Iowa, 510. Whether that case can be reconciled within the cases above cited, we need not determine. Conceding that it holds a very different rule, it is not authority for the defendants. The note in that case, it was held, appeared upon its face to be the obligation of the defendant corporation, at least with an ex-

planation of abbreviations used. In our opinion, the defendants in the case at bar, in executing the contract, assumed a personal obligation, and it was not proper, we think, to allow them to show by parol that such was not in fact the understanding." See, also, *Hayes v. Matthews*, 63 Ind. 412; *Cohokea v. Rantenburg*, 88 Ill. 219.

¹ *Childs v. Monins*, 2 Br. & B. 460; *Forster v. Fuller*, 6 Mass. 58; *Tassey v. Church*, 4 W. & S. 346.

² *Hills v. Bannister*, 8 Cow. 31.

³ *Jones v. Downman*, 4 Q. B. 235; *Childs v. Monius*, 2 Brod. & B. 460; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Moss v. Livingston*, 4 Comst. 208; *Rossiter v. Rossiter*, 8 Wend. 494; *Brinley v. Mann*, 2 Cush. 337; *Taft v. Brewster*, 9 Johns. R. 334; *Pentz v. Stanton*, 10 Wend. 277; *Stone v. Wood*, 7 Cow. 453; *Hills v. Bannister*, 8 Cow. 31; *Forster v. Fuller*, 6 Mass. 58; *Barker v. Ins. Co.*, 3 Wend. 94; *Collins v. Ins. Co.*, 17 Oh. St. 215; *Scott v. Baker*, 3 W. Va. 285; *Rand v. Hale*, 3 W. Va. 495; *Wh. on Ag. §§ 490, 504*. In *Baldwin v. Bank*, 1 Wall. 234, it was held admissible to prove by parol the bank of which the party signing was cashier, he simply signing as cashier.

that he acts on a principal's behalf.¹—A distinction has been taken in this respect between sealed and unsealed notes. If an unsealed negotiable note is signed by A. as "A. for B.," B. is held to be the party to be sued.² A different rule, however, has been propounded when the agent executes a sealed note with his own seal, and makes no reference in the body of the instrument to the principal. Thus, in a North Carolina case in 1881, the plaintiff sued upon the following bond: "On or before January 1, 1879, I promise to pay to the order of Albert S. Bryson, one thousand dollars with interest from date, being part payment of a certain tract of land, for which bond has been given, bearing even date with this note. Witness my hand and seal this 2d day of July, 1877. (Signed by H. S. Lucas. [Seal.] For Charles Callender, President of the Chester Mica and Porcelain Co.)" It was held by the supreme court that on this bond Lucas was personally liable.³—The

¹ Dutton *v.* Marsh, L. R. 6 Q. B. 361; Haverhill Ins. Co. *v.* Newhall, 1 Allen, 130; Barker *v.* Ins. Co., 3 Wend. 94; Wh. on Ag. §§ 449, 504; and see as to agencies of corporations, *supra*, § 134.

² *Ibid.*; Story on Agency, § 144; Bank of Cape Fear *v.* Wright, 3 Jones, N. C. 376.

³ "In our opinion," said Smith, C. J., "the writing is in effect as well as in form the personal bond of the defendant, notwithstanding the mode of its execution and signature, and this proposition is fully supported by authority. Nowhere in the body of the note is the name of any supposed principal mentioned or referred to. Its language is entirely personal,—'I promise to pay Albert S. Bryson,'—and it concludes with the words, 'witness my hand and seal,' and then the seal is affixed to the name of the promisor, the defendant. While the consideration recited is the sale of a tract of land of which this is a part of the purchase-money, it is not stated to whom the sale was made, and this only appears

from the plaintiff's covenant, referred to as of the same date, and which when produced bears an earlier date. But waiving the discrepancy in the bonds, there is no incongruity in the defendant's assuming a personal obligation for the payment of the purchase-money for the land sold and to be conveyed to another, nor does this fact change or impair the individual liability incurred. Combe's case, 9 Coke, 76 *b*; Stone *v.* Wood, 7 Cowen, 453; Stackpole *v.* Arnold, 11 Mass. 27; Wilks *v.* Black, 2 East, 142; Appleton *v.* Binks, 5 ib. 148; Tippetts *v.* Walker, 4 Mass. 595; Duvall *v.* Craig, 2 Wheat. 45; Townsend *v.* Hubbard, 4 Hill, 351; De Witt *v.* Walton, 5 Seld. 571; Spencer *v.* Field, 10 Wend. 87; Quigley *v.* De Hass, 82 Penn. St. 267; Story on Agency, §§ 153 *et seq.*; 2 Kent Com. 931; Whitehead *v.* Reddick, 12 Ired. 95; Oliver *v.* Dix, 1 Dev. & Bat. Eq. 158. These cases lead to the conclusion that the bond now in suit imposes a personal obligation on the defendant, and not on the company nor on its president, neither of whom is named

addition by parties executing an agreement, of the word "committee" after their names, does not relieve them from personal liability. Like the addition of the word "executor," it identifies a transaction, but does not divest responsibility.¹

§ 811. Where a contract is made with an agent representing an undisclosed principal, the promisee may sue the principal when disclosed, though unknown to be principal at the time of the contract.² The exception, however, is rather nominal than real. The proposal undoubtedly is made to A., the agent, but just as it is admissible for C., the creditor, to sue A. under the name of B., and to show on trial by parol that A., named in the contract, was really B., B. being A.'s real name, so it is admissible to sue P. on the contract, and to prove on the trial that A. during the negotiation was the mere representative of P., and that P. was the real party in interest.³ Another apparent exception is found in the cases where the statements made by promoters of a company before it had a legal existence have been held to bind the company.⁴ But this may be explained on the ground of estoppel, without invading the principle that persons not parties to a contract are not liable to suit for the non performance of its conditions. The companies in question, if they did not authorize, at least adopted statements of their promoters, enjoying the franchises thereby obtained, and may on this ground have been held bound by such statements.⁵

in the body of the instrument, to pay the money specified and due under it." *Bryson v. Lucas*, 84 N. C. 680.

¹ *Ulam v. Boyd*, 87 Penn. St. 477.

² *Wh. on Agency*, § 464; *Ch. on Pl.* 16th Am. ed. (1879), 40; *Addison v. Gandasequi*, 4 Taunt. 574; *Priestly v. Fernie*, 3 H. & C. 977; *Thomson v. Davenport*, 9 B. & C. 78; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Ford v. Williams*, 21 How. 287; *Baldwin v. Leonard*, 39 Vt. 260; *Southard v. Sturtevant*, 109 Mass. 390; *Meeker v. Claghorn*, 44 N. Y. 349; *Youghioghny Iron Co. v. Smith*, 66 Penn. St. 340;

Thomas v. Atkinson, 38 Ind. 248; *Wheeler v. Reed*, 36 Ill. 82; see *Irvine v. Watson*, L. R. 5 Q. B. D. 414.

³ That undisclosed principal may sue, see *supra*, § 802.

⁴ *Pollock*, 3d ed. 209, citing *Lindlay*, I. 395-7.

⁵ *Govett v. Richmond*, 7 Sim. 1, rules that in a bill for specific performance of an award, a person not a party to the reference, who had not in any way assented to it, could be made a party, on the ground that he was interested in the subject matter. This decision *Mr. Pollock* (3d ed. 210) criticizes as

§ 812. We have already seen that if B., in discharge of a contractual duty to A., so conducts himself as negligently or wilfully to injure A., he is liable to A. in damages.¹ An action of tort, also, as we have seen, lies against the defendant for maliciously procuring a third person to break a contract with the defendant.² But this must be in an action based exclusively on the tort. On the contract a third party cannot sue.³

Action of tort may be maintained for abuse of contractual relations.

§ 813. By novation, as is elsewhere more fully seen, a new debtor may be grafted on an old agreement.⁴ Either to obtain the release of the original debtor, which by itself is a good consideration, or to obtain some benefit to the new promisor, emanating from the promisee, such a promise may be validly made.⁵

By novation a new debtor may be introduced.

"quite contrary to principle," and holds that "it cannot stand with Lord Cottenham's decision in *Tasker v. Small*, 3 My. & Cr. 63, that in a suit for the specific performance of a contract third persons claiming an interest in the subject matter are not even proper parties." Mr. Pollock very properly adds that "even without this it is surely obvious (unless and until a court of final appeal shall think otherwise) that A. and B. have no business to submit C.'s rights to the arbitration of D."

That a company can ratify a contract made by its promoters before its organization was denied in *Empress Engineering Co. in re*, L. R. 16 Ch. D. 125, overruling *Spiller v. Paris Rink*, L. R. 7 Ch. D. 368. "Companies have been held in equity to be bound by the agreements of their promoters, but on grounds independent of contract." Pollock, 3d ed. 119, citing *Lindley*, i. 363,

395; see *Van Schaick v. R. R.*, 38 N. Y. 346.

¹ *Langridge v. Levy*, 2 M. & W. 519; Wh. on Neg. § 441, and cases there cited, and see *supra*, § 791, where a recovery against a telegraph company by the receiver of a wrong telegram is thus sustained, and *Little v. Banks*, 83 N. Y. 258, cited *supra*, § 786, which may be explained on the same ground.

² *Lumley v. Gye*, 2 E. & B. 216; aff. *Cattle v. Stockton Water Works*, L. R. 10 Q. B. 458; *Bowen v. Hall*, L. R. 6 Q. B. D. 333; see *Wald's Pollock*, 188, citing *Walker v. Cronin*, 107 Mass. 555; *Rice v. Manly*, 66 N. Y. 82; *Jones v. Stanley*, 76 N. C. 355, and other cases.

³ *Atkinson v. Water Works*, L. R. 2 Ex. D. 441; *Nickerson v. Hydraulic Works*, 46 Conn. 24; *Davis v. Water Works*, 54 Iowa, 61; cited *supra*, § 786. But see *Little v. Banks*, 83 N. Y. 258, cited *supra*, § 786.

⁴ See §§ 852 *et seq.*

⁵ See *supra*, § 505.

III. JOINT PLAINTIFFS AND DEFENDANTS.

1. *Plaintiffs.*

§ 814. Where a contract is made for the benefit of two or more joint promisees, all must join in the suit;¹ nor will a disclaimer even by deed by one of such joint promisees of all interest in the debt discharge it from his control so as to enable his joint promisees to sue without him.²—As will be hereafter seen, death severs a joint contract so that the survivor can sue; and a severance, also, is worked by one of the joint creditors settling with the debtor for his claim in such a way as not to work a release.³ It has been also held that a severance may be worked by the acceptance by each of the joint promisees of special independent promises from the debtor.⁴

§ 815. When, however, the promisees are not joint, but several—*i. e.*, when on the face of the obligation each has a distinct interest—any one of

¹ Leake, 2d ed. 140, 452; 1 Smith's L. C. 7th ed. 877; Pease *v.* Hirst, 10 B. & C. 122; Hopkinson *v.* Lee, 6 Q. B. 964; Rose *v.* Poulton, 2 B. & Ad. 822; Soorsbie *v.* Park, 12 M. & W. 146; see Wakefield *v.* Brown, 9 Q. B. 209; Jordan *v.* Wilkins, 3 Wash. C. C. 40; Dob *v.* Halsey, 16 Johns. 34; Heron *v.* Hoffner, 3 Rawle, 393; Wilson *v.* Wallace, 8 S. & R. 53; Archer *v.* Bogue, 3 Scam. 526; Hervey *v.* Mt. Pleasant, 70 Mo. 500.

² *Ibid.*; Petrie *v.* Bury, 3 B. & C. 353; Wetherell *v.* Langston, 1 Ex. 634; see Dicey on Parties, Am. ed. 1879, 11, 104. And see as sustaining the text Ulmer *v.* Cunningham, 2 Greenl. 117; Moody *v.* Sewall, 14 Me. 295; Hilliker *v.* Loop, 5 Vt. 116; Wright *v.* Post, 3 Conn. 142; Halliday *v.* Doggett, 6 Pick. 359; Tate *v.* Ins. Co., 13 Grey, 79; Dob *v.* Halsey, 16 Johns. 34; Sweigart *v.* Berk, 8 S. & R. 308; Michener *v.* Dale, 23 Penn. St. 59; Meason *v.* Kaine, 67

Penn. St. 126; Jacobs *v.* Davis, 34 Md. 204; Tapscott *v.* Williams, 10 Ohio, 442; Sims *v.* Tyre, 3 Brev. 249; Lucas *v.* McAlilly, 1 McM. 311. That one party may use the name of another without his consent, on tendering indemnity, see Chambers *v.* Donaldson, 9 East, 471; Wright *v.* McLemore, 10 Yerg. 235.

³ Austin *v.* Walsh, 2 Mass. 405; Baker *v.* Jewell, 6 Mass. 460; Beach *v.* Hotchkiss, 2 Conn. 697; Ch. on Pl. 16th Am. ed. (1879) 11.

⁴ *Ibid.*; Austin *v.* Welsh, 2 Mass. 401; Gould *v.* Gould, 6 Wend. 263. That a party who is obligor in a joint claim, of which, with others, he is obligee, cannot maintain an action at law on the claim, see Bedford *v.* Bruton, 1 Bing. N. C. 399; Beecham *v.* Smith, E. B. & E. 442; Faulkner *v.* Faulkner, 73 Mo. 339; *supra*, § 805. It is otherwise with joint and several obligations. *Ibid.*

them may sue.¹ But the mere designating of the shares of the promisees does not produce a severance unless it should appear that it was intended that each party should separately sue for his specific claim.² It is otherwise, however, when the interests of the promisees are practically several.³ The tests given by Mr. Dicey⁴ are (1) "where there is a separate consideration proceeding from different persons, there is considered to be a contract with each of them, and they, therefore, cannot join in an action for breach of contract."⁵ (2) "Where the consideration moves from several persons jointly, such persons, as having the joint legal interest in the contract, should be joined as plaintiffs in suing for a breach of the contract."⁶

§ 816. The question of the relationship of promisees to each other in this connection is one of construction.⁷ It has been said, indeed, that when the promisees have separate and unequal interests, then their claims are to be regarded as several.⁸ But this should yield to the general meaning of the document. Parties having separate and unequal interests may agree to become joint promisees; those having equal interests to become several promisees, and so with regard to debtors.⁹ But when the interest of the promisees is entire, and the debt is limited to them in aggregate, the inference is that the obligation is joint.¹⁰

Question
one of con-
struction
and parol
explana-
tion.

¹ *Geer v. Richmond*, 6 Vt. 76; *Catawissa R. R. v. Titus*, 49 Penn. St. 277; *Beale*, 10 C. B. 739.

Quisenberry v. Artis, 1 Duvall, 30. ⁶ *Lush*, Practice, 3d ed. 21; *Jones v. Robinson*, 1 Exch. 454; *Agacio v. Forbes*, 14 Moo. P. C. 160.

² *Byrne v. Fitzhugh*, 1 C. M. & R. 613; see *Hall v. Leigh*, 8 Cranch, 50; *Blanchard v. Dyer*, 21 Me. 111; *Pearson v. Parker*, 3 N. H. 366; *Smith v. Talcott*, 21 Wend. 202; *Settembre v. Putnam*, 30 Cal. 490.

³ *Ship Potomac in re*, 2 Black. 581; *Hall v. Leigh*, 8 Cranch, 50; *Bunker v. Tufts*, 55 Me. 180; *Sharp v. Conkling*, 16 Vt. 355; *Yates v. Foot*, 12 Johns. 1; *Fauble v. Davis*, 48 Iowa, 462; *Jones v. Etheridge*, 6 Port. 208.

⁴ *Parties* (Am. ed. 1879), 106.

⁵ *Hill v. Tucker*, 1 Taunt. 7; *Chanter*

⁷ *Supra*, § 641 *et seq.*, 803.

⁸ *Shep. Touch.* 166, *Preston's note*; *Servante v. James*, 10 B. & C. 410; *Beccleston v. Clipsham*, 1 Wms. Saund. 153; *Ludlow v. McCrea*, 1 Wend. 228; *Phillips v. Bonsall*, 2 Binn. 138.

⁹ *Mills v. Ladbroke*, 7 M. & G. 28; *Poole v. Hill*, 6 M. & W. 835; *Hall v. Leigh*, 8 Cranch, 50.

¹⁰ *Lane v. Drinkwater*, 1 C. M. & R. 613; *May v. May*, 1 C. & P. 44; *Pickering v. De Rochemont*, 45 N. H. 76.

The distinction is illustrated by rulings to the effect that when a payment is made by several from a *joint* fund, belonging to them *in solido*, they must join in a suit for reimbursement; but that it is otherwise if the payment, though joint, is made up by the contributors from their individual means.¹ When sureties, also, pay a debt jointly, and this is all that appears in the transaction, they must join in the action against their principal;² but this yields to any inferences that the payment was by individual separate contribution, in which case each surety is to sue separately.³—Where the intention is that the promisees are to have separate interests, then their claims are to be construed as several. Such is the case with composition deeds by debtors giving each promisee a distinct interest;⁴ and when distinct and inconsistent duties are to be performed to the promisees individually, this implies severance.⁵—A note payable to A. or B. has been held to make A. and B. joint payees.⁶—Parol evidence, also, in case of latent ambiguities, is admissible to explain the relations of the parties.⁷

§ 817. The prevalent opinion at common law is that a contract cannot be so framed as to give the promisees the right to sue on it both jointly and severally.⁸ The promisees must be held as entitled to sue either jointly only or severally only.⁹ Obligations of this class, therefore, must be construed to be joint, or joint and several, as the case may be.¹⁰ And it has been held

Plaintiffs
cannot sue
both jointly
and sever-
ally.

¹ Pearson v. Barker, 3 N. H. 366; Appleton v. Bascom, 3 Met. 169; Smith v. Hicks, 1 Wend. 206.

² Appleton v. Bascom, 3 Metc. 169; Clapp v. Rice, 15 Gray, 557; Gould v. Gould, 6 Wend. 263.

³ Lombard v. Cobb, 14 Me. 222.

⁴ Gresty v. Gibson, L. R. 1 Exch. 112.

⁵ Owston v. Ogle, 13 East, 538; Brand v. Boulcott, 3 B. & P. 235; Jewell v. Cunard, 3 Wood. & M. 277; Olmstead v. Bailey, 35 Conn. 584.

⁶ Willoughby v. Willoughby, 5 N. H. 244; Osgood v. Pearsons, 4 Gray, 455; though see Ellis v. McLemore, 1 Bailey, 13, and Ch. on Pl. 16th Am. ed. (1879), 10.

⁷ Wh. on Ev. §§ 949 *et seq.*; Cross v. Williams, 72 Mo. 577; *supra*, § 804.

⁸ 2 Ch. on Cont. 11th Am. ed. 1341; Dicey, *ut supra*, 111; Bradburne v. Botfield, 14 M. & W. 559, 573; James v. Emery, 8 Taunt. 245; Dob v. Halsey, 16 Johns. 34; Sweigart v. Berk, 8 S. & R. 308.

⁹ See Pugh v. Stringfield, 3 C. B. N. S. 2; S. C., 4 C. B. N. S. 364; Broom, Parties, 2d ed. §§ 20-21; Lush, Practice, 3d ed. 222; Jewell v. Cunard, 3 Wood. & M. 277.

¹⁰ Slingsby's case, 5 Co. 19 a; Bradburne v. Botfield, 14 M. & W. 573. This rule is criticized by Rolfe, B., in Keightley v. Watson, 3 Ex. 724, saying: "it

that the obligation cannot be treated as joint so far as concerns some of the obligors, and several so far as concerns others; it must be regarded as joint as to all, or several as to all.¹ But in the same contract there may be two distinct covenants, one joint, and the other several.²

§ 818. All the members of a partnership should be plaintiffs in a suit on a debt due the firm;³ nor does it make any difference that the partnership has been dissolved between incurring the debt and bringing suit.⁴ The names of *dormant* partners, not privy to the contract, like the names of undisclosed principals, may be omitted.⁵ And a partner who is the sole ostensible party to the contract, and exclusively interested in it, can sue on it alone.⁶

All partners should sue.

§ 819. Members of a partnership, or of any business association in general, cannot depute any one person to represent them for the purpose of bringing suit.⁷ In England this question has arisen from the efforts of unincorporated societies to get rid of the difficulties attending joint suits by appointing a specific person to sue on contracts in which they are interested. Attempts of this kind, however, have failed on the ground "that the proper person to bring an action is the person whose right has been violated."⁸ This principle has been held to invalidate a suit brought by the managers of an

Qualification as to one of several contractors suing as representative.

is clear that parties can so contract by separate deeds; why, then, should they not be able to do so by separate covenants in the same deed?" *Gresty v. Gibson*, L. R. 1 Exch. 112; see *Howe v. Hendley*, 25 Me. 116.

¹ *Cabell v. Vaughan*, 1 Wms. Saund. 291; *Streatfield v. Halliday*, 3 T. R. 782; see *infra*, §§ 825 *et seq.*

² *James v. Emory*, 8 Taunt. 245; *Duval v. Craig*, 2 Wheat. 45; *Calvert v. Bradley*, 18 How. U. S. 580; *Sharp v. Conklin*, 16 Vt. 355.

³ Ch. on Pl. 16th Am. ed. 13; *Story*, Part. § 241; *Collyer*, Part. §§ 649 *et seq.*; *Halliday v. Doggett*, 6 Pick. 359; *Hewes v. Bayley*, 20 Pick.

96; *Gould v. Gould*, 6 Wend. 264; *Wilson v. Wallace*, 8 S. & R. 53.

⁴ *Page v. Wolcott*, 15 Gray, 536.

⁵ *Skinner v. Stocks*, 4 B. & Ald. 437; *Steel v. Western*, 7 Moore, 31; *Lapham v. Green*, 9 Vt. 407; *Lord v. Baldwin*, 6 Pick. 352; *Beach v. Hayward*, 10 Ohio, 455.

⁶ *Parsons v. Crosby*, 5 Esp. 199; *Glossop v. Colman*, 1 Stark. 21; *Davenport v. Rackstrow*, 1 C. & P. 89.

⁷ *Parsons v. Crosby*, 5 Esp. 199; *Barker v. Stubbs*, 1 M. & G. 44.

⁸ *Willes, J.*, *Gray v. Pearson*, L. R. 5 C. P. 568; see *Sweigart v. Berk*, 8 S. & R. 308; *Dicey, ut supra*, 116.

unincorporated mutual marine insurance company;¹ by the purser for the time being of a cost-book company;² and by the directors of a company.³ Even negotiable paper made to the treasurer for the time being of an unincorporated society is open to the same objection, the reason given being that "the payee must be a person capable of being ascertained at the time of making the note or accepting the bill."⁴ It is otherwise, however, when to the actual contracting parties (*e. g.*, the trustees of a particular chapel) is joined the treasurer alternatively, since the treasurer is to be regarded in such case as the agent of the trustees to receive the money.⁵ There is nothing, also, in this rule which prevents the parties to simple contracts not based on negotiable paper from providing that one of their number shall be empowered to sue for any breach of the contract for the benefit of all but the parties sued.⁶ This is common in partnership agreements in which it is stipulated that one partner may sue, in the names of all but the delinquent, for whatever may be due from a defaulting partner.⁷ In equity, however, and in common law courts having equity jurisdiction, any one member, either in his own behalf or on behalf of himself and others, may proceed for an account; and in England "the rules of the supreme court, following the former practice of the court of chancery, now provide that 'where there are numerous persons having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the court to defend in such action on behalf or for the benefit of all parties so interested.'"⁸ The only exception is that a person not really interested cannot be put forward as a representative.⁹

¹ Gray v. Pearson, *ut supra*.

² Hybart v. Parker, 4 C. B. N. S. 209.

³ Hall v. Bainbridge, 1 Man. & G. 42; Phelps v. Lyle, 10 A. & E. 113.

⁴ Pollock, 3d ed. 223, citing Storm v. Stirling, 3 E. & B. 832, under name of Cowie v. Stirling, 6 E. & B. 333; Yates v. Nash, 8 C. B. N. S. 581.

Holmes v. Jacques, L. R. 1 Q. B. 376.

⁵ See Dicey, *ut supra*, 116; Hybart v. Parker, 4 C. B. N. S. 209.

⁷ Radenhurst v. Bates, 3 Bing. 463; Pollock, 3d ed. 221. "Of course," says Mr. Pollock commenting on this case, "they must take care to make the penalty not to the whole firm, but to the members of the firm *minus* the offending partner."

⁸ Pollock, 3d ed. 223.

⁹ *Ibid*.

§ 820. Upon the death of a joint promisee, the survivor alone can sue, and on the death of the survivor the right accrues solely to his personal representatives.¹ In equity, however, the survivor who collects a debt may be liable to the personal representatives of the deceased promisee.² But the executor of a deceased promisee cannot be joined with the surviving promisee.³ No such survivorship exists as to several debts.⁴

On death of joint promisee debt survives.

§ 821. When there are two or more joint promisees, a release by one releases for all, and a receipt by one is a receipt for all.⁵ The court, however, will set aside a release that is plainly fraudulent, so far as concerns joint creditors;⁶ though not because the party releasing, if a party to the record, and representing an interest, had no actual personal interest.⁷ But supposing the release to be *bona fide*, it operates where it is validly⁸ executed by one of several joint creditors, whether acting in a personal or fiduciary capacity, as a release of the debt so far as concerns all the joint creditors.⁹ It is only in cases where the release

One joint promisee may release.

¹ Leake, 2d ed. 453; Ch. on Pl. 16th Am. ed. 21; *Martin v. Crompe*, 1 Ld. Ray. 340; *Jones v. Yates*, 9 B. & C. 532; *Anderson v. Martindale*, 1 East, 497; *Jell v. Douglass*, 4 B. & Ald. 374; *Crocker v. Beall*, 1 Low. 416; *Burnside v. Merrick*, 4 Met. 540; *Murray v. Mumford*, 6 Cow. 441; *Stowell v. Drake*, 3 Zab. 310; *Kinsler v. McCants*, 4 Rich. 46.

² *Martin v. Crompe*, 1 Ld. Ray. 340; *Anderson v. Martindale*, 1 East, 497; *Vickers v. Cowell*, 1 Beav. 529; see *supra*, §§ 765-6.

³ *Smith v. Franklin*, 1 Mass. 480; *Peters v. Davis*, 7 Mass. 257; *Clark v. Parish*, 1 Bibb, 547, 3 Bibb, 261; *Murphy v. Bank*, 5 Ala. 421.

⁴ 1 Saund. 153; *Enys v. Donnithorne*, 2 Burr. 1197; *Carthrae v. Brown*, 3 Leigh, 98.

⁵ *Infra*, § 949; Dicey, *ut supra*, 108; *Jacob v. Harwood*, 2 Ves. Sen. 265; *Johnson v. Holdsworth*, 4 Dow. P. C.

63; *Herbert v. Piggett*, 2 C. & M. 384; *Rawstorne v. Gandell*, 15 M. & W. 304; *Tuckerman v. Newhall*, 17 Mass. 581; *Wiggin v. Tudor*, 23 Pick. 444; *Pierson v. Hooker*, 3 Johns. 68; *Napier v. McLeod*, 9 Wend. 120; *Newcomb v. Raynor*, 21 Wend. 108; *Bruen v. Marquand*, 17 Johns. 58; and cases cited *infra*, §§ 949, 957. As to whether an informal discharge operates as a release, see *infra*, § 941. As to release generally, see *infra*, § 1031.

⁶ *Jones v. Herbert*, 7 Taunt. 421; *Piercy v. Fynney*, L. R. 12 Eq. 69; *Barker v. Richardson*, 1 Y. & J. 362; *Skaife v. Jackson*, 3 B. & C. 422; *Gram v. Cadwell*, 5 Cow. 489; see *Phillips v. Clagett*, 11 M. & W. 84.

⁷ *Gibson v. Winter*, 5 B. & Ad. 102.

⁸ *Infra*, § 941.

⁹ *Ibid.*; 2 Ch. on Cont. 11th Am. ed. 1152; *Bac. Abr. Release*, D. *Wilkinson v. Lindo*, 7 M. & W. 81; *Halsey v. Whitney*, 4 Mason, 206; *Decker v.*

is given in fraud of the other joint creditors and in collusion with the debtor that equity will interfere.¹

§ 822. An unamended non-joinder of a plaintiff who ought to be joined, if it appears on the pleadings, is fatal on demurrer;² if it appears on trial, and is not amended, is ground for a nonsuit, or for a verdict for the defendant.³ Under the English statutes, now in substance adopted in most jurisdictions in this country, the defect of non-joinder of plaintiffs can be cured before or during trial.⁴ At common law, in arrest of judgment or in error, such non-joinder, if material, and if apparent on the record, will be fatal.⁵

§ 823. What has been said of non-joinder applies to misjoinder, when such misjoinder affects the cause of action. But in England, when an action is "brought by A. and B., which should be brought by B. alone, judgment (under the common law procedure act, and under similar statutes in this country) may be given in favor of such one (or more) of them as are entitled to recover. But the defendant, though unsuccessful, is entitled to any costs occasioned by the misjoinder."⁶

Livingston, 15 Johns. 479; Murray v. Blatchford, 1 Wend. 583; Smith v. Stone, 4 Gill & J. 310.

¹ Leake, 2d ed. 933; Piercy v. Fynney, L. R. 12 Eq. 69.

² Ch. on Pl. 16th Am. ed. 15; Debolt v. Carter, 31 Ind. 355.

³ Dicey on Parties, Am. ed. 1879, 502; Leake, 2d ed. 453; Chanter v. Leese, 4 M. & W. 295; Baker v. Jewell, 6 Mass. 460; Beach v. Hotchkiss, 2 Conn. 697; Ehle v. Purdy, 6 Wend. 629; Waldsmith v. Waldsmith, 2 Ohio, 156.

⁴ Wickens v. Steel, 2 C. B. N. S. 488; Robson v. Doyle, 3 E. & B. 396; Wilkin v. Reed, 15 C. B. 192.

⁵ Ch. on Pl. 16th Am. ed. 15; 1 Saund. 154, note (1); Snelgrove v. Hunt, 2 Stark. 374; Wiggin v. Cummings, 8 Allen, 353; Wright v. Post, 3 Conn. 142; Ziele v. Campbell, 2 John. Ca. 384; Wilson v. Wallace, 8 S. & R. 53. *Aliter* by statute. Lewis v. McNatt, 65 N. C. 63.

⁶ Dicey on Parties (Am. ed. of 1879), 504, citing Bremner v. Hull, L. R. 1 C. P. 748; see Lillard v. Ruckers, 9 Yerg. 64. In Whiting v. Cook, 8 Allen, 63, it was held that it was error requiring reversal to enter a joint judgment for a sum of money bequeathed to be equally divided between plaintiffs.

2. *Defendants.*

§ 824. Joint promisors or contractors must be sued jointly, the rule being that where several persons are jointly liable on a contract, they must all be sued in an action for the breach thereof;¹ and this, though the promisors agree among themselves that the duty is to be performed by one of them exclusively.² The rule, however, does not apply where a co-debtor lives out of the jurisdiction;³ or where he is not *capax negotii*;⁴ or where he is relieved by the statute of limitations.⁵

Joint defendants must be sued jointly

§ 825. "If A. and B. covenant jointly and severally, the covenant may be joint or several, and the covenantors may be sued either altogether, or all of them apart, at the election of the covenantee."⁶ A joint and several promissory note, therefore, may be treated either as a joint note, or as a series of as many separate notes as there are distinct joint and several makers.⁷ Hence every joint and several debt includes a joint debt, and as many several debts as there are debtors. When the debt is several as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately, though their interest be joint.⁸

Debts may be joint or several.

¹ Dicey, *ut supra*, 230; Ch. on Pl. 16th Am. ed. 48; 1 Wms. Saund. 291; Platt on Cov. 117; Beggs v. Butler, 9 Paige, 226; Pollard v. Collier, 8 Ohio, 43; McCall v. Price, 1 McCord, 82. As to mode of objecting to non-joinder see *infra*, § 833.

² Lodge v. Dicas, 3 B. & Ald. 611. See on this point *supra*, § 808.

³ Joll v. Curzon, 4 C. B. 249.

⁴ See Boyle v. Webster, 17 Q. B. 950.

⁵ Boydell v. Drummond, 2 Camp. 157.

⁶ Leake, 2d ed. 454, citing Shepp. Touch. by Preston, 166, 180; Fletcher v. Dyche, 2 T. R. 32; see Hemmenway v. Stone, 7 Mass. 58; Peckham v. North Parish, 16 Pick. 274; Ernst v. Bartle, 1 John. Ca. 319; McCready v. Freed-

ley, 3 Rawle, 251; Knisely v. Shemberger, 7 Watts, 193.

⁷ Beecham v. Smith, E. B. & E. 442; Owen v. Wilkinson, 5 C. B. N. S. 526.

⁸ Ch. on Pl. 16th Am. ed. 51; 2 Ch. Cont. 11th Am. ed. 1355; 1 Saund. 153, note (1). In Massachusetts persons severally liable upon contracts in writing including all parties to negotiable paper, may be joined in the same cause of action. See Wallis v. Carpenter, 13 Allen, 19; Costigan v. Lunt, 104 Mass. 217.

"Each party to a joint contract is severally liable in one sense, *i. e.*, if sued severally and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument,

§ 826. The question whether a debt is joint or joint and several depends on the construction of the terms used.¹ "With respect to the rights of two or more persons joining in a contract as creditors, the general rule of construction is to the effect that a contract will be construed to be joint or several, according to the interest of the parties, if the words are capable of that construction, or even if they are not inconsistent with it; if the words are ambiguous or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several."² What has been said with regard to written promises applies equally to implied promises. The intent of the parties is to prevail.³ But as a general rule, where the consideration is joint the promise is joint.⁴

§ 827. When a debt is payable by two or more debtors, it is on its face joint, and not joint and several.⁵ The question, however, is one of construction, to be governed by a survey of the entire document.⁶

though on one piece of parchment or paper, in effect composes the joint bond of all and the several bonds of each of the obligors."—Parke, B., in *King v. Hoare*, 13 M. & W. 505.

"When the contract is joint and several, and the debt or demand considerable, it is most advisable to proceed separately, for if all the parties be joined, and one of them die after judgment and before execution, the remedy at law against the personal estate or assets of the deceased is determined."—Ch. on Pl. 16th Am. ed. (1879), 51; *Foster v. Hooper*, 2 Mass. 572; *Com. v. Miller*, 8 S. & R. 452.

¹ See *supra*, §§ 641 *et seq.*; *infra*, § 829; *Eaden v. Titchmarsh*, 1 A. & E. 691; *Knisely v. Shenberger*, 7 Watts, 193; *Jacobs v. Davis*, 34 Md. 204; *Carthrae v. Brown*, 3 Leigh, 98; *Lloyd v. Ashby*, 2 C. & P. 138.

² Leake, 2d ed. 457; Shepp. Touch. by Prest. 166; adopted in *Sorsbie v. Park*, 12 M. & W. 146; and *Keightley v. Watson*, 3 Ex. 716; and see *Ludlow v. McCrea*, 1 Wend. 228.

³ *Hall v. Leigh*, 8 Cranch, 51; *Boggs v. Curtin*, 10 S. & R. 211; *supra*, §§ 627 *et seq.*

⁴ *Supra*, §§ 506 *et seq.*; *Jones v. Robinson*, 1 Exch. 454; *Chanter v. Leese*, 5 M. & W. 701; *Hatsall v. Griffith*, 2 Cr. & M. 679. Joint obligations are joint and several under the Missouri statute. *Knox Co. Bk. v. Cottey*, 70 Mo. 150.

⁵ Shep. Touch. 375; *King v. Hoare*, 13 M. & W. 499; *English v. Blundall*, 8 C. & P. 332; *Ehle v. Purdy*, 6 Wend. 629; *Yorks v. Peck*, 14 Barb. 644.

⁶ *Supra*, §§ 641 *et seq.* As to construction based on interest, see *supra*, § 816.

§ 828. When the singular "I" instead of the plural "we" is used, this is a presumption that the obligation was meant to be several;¹ though even here distinctive phraseology in this respect must yield to the general tenor of the instrument.²—The signing and sealing by an individual, as for a separate debt, implies intended severance.³

Otherwise if debt is payable individually.

§ 829. By the *obligatio in solidum* of the Roman law, each of several debtors became liable for the solid or entire debt, or one debtor binds himself alternatively and separately to each of several creditors.⁴ Supposing that there are several creditors and several debtors, each creditor can demand the whole debt from each debtor, and if one debtor pays, the rest are all relieved.⁵ A defence, therefore, purely personal to a single debtor or to a single creditor, does not, if it does not amount to payment, release the debt so far as it concerns the other parties. It is otherwise, however, when the debt is paid, or tendered, or when there is compensation or novation going to the whole obligation.⁶ In our own law we have illustrations of this kind of obligation in cases in which a principal debtor and sureties become bound severally for a particular debt. The creditor may sue either separately, though payment by any one of them extinguishes the debt so far as the creditor is concerned.⁷ In such case the surety who pays the debt is entitled to contribution from the principal.⁸

Debtors may make themselves severally liable to each of several creditors.

§ 830. The liabilities of partners are joint and several, at least in equity, although by the strict rule of the common law "the legal remedy exists only against the survivors."² As the rule is stated by James, L.

Liability of partners is joint and several.

¹ March v. Ward, Peake, 130; Van Alstyne v. Van Slyck, 10 Barb. 387; Dill v. White, 52 Wis. 459; and see Hemmenway v. Stone, 7 Mass. 58.

² Slater v. Magraw, 12 G. & J. 265.

³ Ibid.; Townsend v. Hubbard, 4 Hill, 351.

⁴ See Vangerow, iii. § 593; Demangeat, des obligations solidaire, Unterholzner, 1, §§ 86–91.

⁵ Puchta, § 233; L. 14, pr. D. de nox act. (9, 4) Windscheid, § 298.

⁶ Ibid.

⁷ Leake, 2d ed. 454; Dering v. Winchelsea, 1 Wh. & T. L. C. 4th Am. ed. 120; Campbell v. Rothwell, 47 L. J. C. P. 144.

⁸ Holborn Union v. St. Leonard, L. R. 2 Q. B. D. 145. That a promise to several parties must be either joint or several, see *supra*, §§ 817, 825.

⁹ Leake, 2d ed. 451; Ch. on Pl. 16th Am. ed. (1879) 48; Devaynes v. Noble, 1 Mer. 564; Beresford v. Browning, L.

J., "The liability of partners for property acquired by them as partners is in equity joint and several. That is the usual form of expressing the rule, but it would be more accurate to say that, so far as regards partners, where there is in equity no survivorship of property, there is in equity no survivorship of liability."¹ Nor need dormant partners, any more than undisclosed principals, be sued.²

§ 831. When there are two or more joint debtors, the release under seal of one releases all.³ Nor in such case is it any reply, unless fresh consideration should be proved, that the surviving debtor agreed to remain liable for the debt.⁴ Where, however, the intention is to reconstruct the agreement by way of novation, then, if the discharge of one party be at the request of the other, and was the consideration of the new agreement, the new agreement will stand.⁵ And when it is expressly provided in an agreement that a release given to one of two joint obligors is not to prejudice the right of the plaintiff to sue both obligors jointly—or when a release is given to one of two partners with a proviso that this is not to operate to discharge the other partner, but that notwithstanding the release the partners may be sued jointly—in such cases the debt is not extinguished.⁶—Whether such a release to be effective must be under seal has been much discussed. At common law it

R. 1 C. D. 30. See *Robertson v. Smith*, 18 Johns. 459; *Smith v. Black*, 9 S. & R. 142.

¹ *Beresford v. Browning*, L. R. 1 C. D. 30; adopted *Leake*, 2d ed. 451.

² *Robinson v. Wilkinson*, 3 Price. 538; *Hudson v. Robinson*, 4 M. & S. 475; *Dickinson v. Valpy*, 10 B. & C. 128; *New York Dry Dock Co. v. Treadwell*, 19 Wend. 525.

³ *Brooks v. Stuart*, 9 Ad. & El. 854; *Cheetham v. Ward*, 1 Bos. & P. 633; *Dean v. Newhall*, 8 T. R. 168; *Lunt v. Stevens*, 24 Me. 534; *Shaw v. Pratt*, 22 Pick. 308; *Milliken v. Brown*, 1 Rawle, 391. As to accord and satisfaction with one debtor, see *infra*,

§ 998. As to release by joint debtor, see *supra*, § 831; *infra*, §§ 1031 *et seq.*

⁴ *Brooks v. Stuart*, 9 A. & E. 854; *McAllister v. Sprague*, 34 Me. 296; *Shaw v. Pratt*, 22 Pick. 305; *Pond v. Williams*, 1 Gray, 630. As to covenant not to sue one of several joint debtors, see *infra*, § 1036.

⁵ See *infra*, §§ 852 *et seq.*; *Burke v. Noble*, 48 Penn. St. 168; modifying in this respect *Milliken v. Brown*, 1 Rawle, 391.

⁶ *Solly v. Forbes*, 2 Br. & B. 38; *Twopenny v. Young*, 3 B. & C. 210. See as to Indiana, *Eldred v. Bank*, 71 Ind. 543; *infra*, § 832.

must be under seal.¹ In Pennsylvania, where equity is administered under common law forms, the seal is not necessary;² and this is now the case in all jurisdictions where a release on a sufficient consideration is proved;³ or where the release amounts to an accord and satisfaction.⁴—The reason for the rule in general is that, unless it were maintained, “the co-debtor, after paying the debt, might sue him who had been released for contribution; and so in effect he would not be released at all;”⁵ and this has been applied to all releases on joint contracts.⁶—But a covenant not to sue one joint debtor does not release the other;⁷ nor is an informal discharge of one joint debtor a discharge of the others.⁸ In England, however, an accord and satisfaction with one joint debtor, though not under seal, discharges the others;⁹ though it is otherwise, as we have seen, with a mere covenant not to sue.¹⁰—Although in law the release by a creditor of one surety releases the others from their liability,¹¹ yet in equity it has been held that a discharge of a particular surety after a composition with such surety does not preclude the creditor from recovering from the other surety his share of the original obligation.¹²

¹ *Infra*, § 941; 2 Ch. on Cont. 11th Am. ed. 1133; *Walker v. McCullough*, 4 Greenl. 421; *Lunt v. Stevens*, 24 Me. 534; *Shaw v. Pratt*, 22 Pick. 308; *Rowley v. Stoddard*, 7 Johns. 209; *De Zeny v. Bailey*, 9 Wend. 336.

² *Milliken v. Brown*, 1 Rawle, 391.

³ *Infra*, § 941.

⁴ *Infra*, § 996.

⁵ Per cur. *North v. Wakefield*, 13 Q. B. 536.

⁶ *Nicholson v. Revill*, 4 A. & E. 675; *Cheetham v. Ward*, 1 B. & P. 630.

⁷ *Dean v. Newhall*, 8 T. R. 168; *Henderson v. Stobart*, 5 Ex. 99; *Shed v. Pierce*, 17 Mass. 628; *Couch v. Mills*, 21 Wend. 424; see *McLellan v. Bank*, 24 Me. 566. Whether a deed is a release or a covenant not to sue is a question of construction; see *Cocks v. Nash*, 9 Bing. 348; *McAllister v. Sprague*, 34 Me. 296; *infra*, § 941.

⁸ *Shaw v. Pratt*, 22 Pick. 308, in which case Dewey, J., said: “Nothing but a technical release under seal discharging one of several promisors can operate to discharge the other promisors from their liability on the contract. This principle is well settled and sustained by many adjudicated cases. *Walker v. McCulloch*, 4 Greenl. 421; *Harrison v. Close*, 2 Johns. 449; *Rowley v. Stoddard*, 7 Johns. 209; *De Zeng v. Bailey*, 9 Wend. 336.”

⁹ *Nicholson v. Revill*, 4 Ad. & El. 675; relying on *Cheetham v. Ward*, 1 Bos. & P. 630; and see *Milliken v. Brown*, 1 Rawle, 391.

¹⁰ *Clayton v. Kynaston*, 2 Salk. 574.

¹¹ *Nicholson v. Revill*, 4 Ad. & El. 675; 6 N. & M. 200; *Pledge v. Buss*, Johns. Ch. 663.

¹² *Story's Eq. Jur.* 12th ed. § 498 a, citing *Gifford ex parte*, 6 Ves. 805;

But the better opinion is that a surety is only to be made liable on the terms of his contract, and that if the exact performance of this contract is made impossible by the action of the creditor in modifying its terms with the principal or with co-sureties, then the contract no longer binds.¹ But if the rights of the creditor against the surety are reserved, in a release of the principal, this is to be construed as not extinguishing the remedy against the surety, but merely as a covenant not to sue the principal.²

§ 832. Each joint debtor is liable for the full amount of the joint debt,³ and on judgment being entered against all jointly, as the nature of the contract requires, the full amount of the judgment may be levied against any one of the joint debtors singly.⁴ It is so, also, in equity practice.⁵ Upon the death of one joint debtor, the survivor becomes exclusively liable, and the estate of the deceased debtor is relieved;⁶ and this is the case with regard to the liability of joint shareholders in a company.⁷ The rule is the same in equity as in law,⁸ though where the facts of the case show that the liability was meant to be several as well as joint, the estate of a deceased joint debtor may be held bound.⁹ And parol evidence is admissible to show that such was the understanding of the parties, and that the indebtedness was made joint instead of

Each joint debtor liable for the whole, but on death liability pursues survivors.

Graham *ex parte*, 5 De G. M. & G. 356; Farmers & Mech. Bk. *v.* Rathbone, 26 Vt. 19; Garey *v.* Hignutt, 32 Md. 552.

¹ Evans *v.* Bremridge, 2 Kay & J. 174; Pearl *v.* Deacon, 1 De G. & J. 461; Breese *v.* Schuler, 48 Ill. 329.

² Green *v.* Wynn, L. R. 7 Eq. 28; 4 Ch. Ap. 204.

³ *Supra*, §§ 824 *et seq.*; Bac. Ab. Oblig. D.

⁴ Leake, 2d ed. 450; Bird *v.* Randall, 1 W. Bl. 388; Abbot *v.* Smith, 2 W. Bl. 949.

⁵ Land Credit Co. *v.* Fermoy, L. R. 5 Ch. 323.

⁶ Leake, 2d ed. 450; Dicey, *ut supra*, 237; Ch. on Pl. 16th Am. ed. 58; Richards *v.* Heather, 1 B. & Ald. 29;

Calder *v.* Rutherford, 3 B. & B. 302; Enys *v.* Donnithorne, 2 Burr. 1196; Sumner *v.* Powell, 2 Mer. 30; Foster *v.* Hooper, 2 Mass. 572; Gere *v.* Clark, 6 Hill, N. Y. 350; Hoskinson *v.* Eliot, 62 Penn. St. 393; Neal *v.* Gilmore, 79 Penn. St. 421; Waters *v.* Riley, 2 Har. & G. 305; Atwell *v.* Milton, 4 Hen. & M. 253; Poole *v.* McLeod, 1 Sm. & M. 391. That this does not obtain in Indiana, see Eldred *v.* Bank, 71 Ind. 543.

⁷ Maria Anna Coal Co. *in re*, L. R. 20 Eq. 585.

⁸ *Ibid.*; Simpson *v.* Vaughan, 2 Atk. 31.

⁹ Prior *v.* Hembrow, 8 M. & W. 873.

joint and several by mutual mistake.¹ And in most jurisdictions in this country, the exclusive liability of survivors is done away with by statute.²—In Pennsylvania, where the survivor is insolvent or bankrupt before suit brought, the executor of the solvent deceased party may at common law be proceeded against.³—As is elsewhere seen,⁴ a surety who pays a joint debt may come down on the estate of a deceased fellow-surety for contribution.

§ 833. The omission of a joint promisor, as a defendant, can at common law be taken advantage of by plea in abatement.⁵ Should the defendant go to trial on the merits, he cannot defend on the ground that others, jointly bound with himself, were not sued.⁶ Thus, where on a bill of exchange drawn upon and accepted by four persons, only three were sued, it was held that the suit could be maintained, although the declaration averred the bill to be drawn upon and accepted only by those who were sued.⁷ But a joint subsisting liability of all parties charged in the pleading must be shown at common law, or

Omission of joint promisor only matter for plea in abatement.

¹ Leake, 3d ed. 451; 1 Story, Eq. Jur. §§ 162 *et seq.*; Beresford v. Browning, L. R. 1 C. D. 30; Thorpe v. Jackson, 2 Y. & C. 553; see Harrison v. Barton, 30 L. J. Ch. 213; Hunt v. Rousmanier, 8 Wheat. 211; Yorks. v. Peck, 14 Barb. 644.

² See Bachelder v. Fiske, 17 Mass. 464; Curtis v. Mansfield, 11 Cush. 152; Taylor v. Taylor, 5 Humph. 110; Davis v. Wilkinson, 1 Hayw. 334.

³ Lang v. Keppeler, 1 Binn. 123.

⁴ *Infra*, § 835; *supra*, § 765.

⁵ Ch. on Pl. 16th Am. ed. 53; Rice v. Shute, 1 Smith, L. C. 7th Am. ed. 870; Cabell v. Vaughan, 1 Wms. Saund. 291; Winslow v. Merrill, 2 Fairf. 127; Nash v. Skinner, 12 Vt. 219; Ziele v. Campbell, 2 John. Ca. 382; Seymour v. Minturn, 17 Johns. 169; Williams v. Allen, 7 Cow. 316; Burgess v. Abbott, 6 Hill, 135; Mer-shon v. Hobensack, 2 Zab. 373; Witmer v. Schlatter, 15 S. & R. 150;

2 Rawle, 359; Horton v. Cook, 2 Watts, 40; Potter v. McCoy, 26 Penn. St. 458; Means v. Milliken, 33 Penn. St. 517; Bledsoe v. Irvin, 35 Ind. 293; Moore v. Russell, 2 Bibb, 442; Henderson v. Hammond, 19 Ala. 340. See, also, Barry v. Foyles, 1 Pet. 317, overruling on this point, Jordan v. Wilkins, 3 Wash. C. C. 110.

⁶ Dicey, *ut supra*, 231; Richards v. Heather, 1 B. & Ald. 35; Cross v. Williams, 7 H. & N. 675; King v. Hoare, 13 M. & W. 505; Barry v. Foyles, 1 Peters, 317; Powers v. Spear, 3 N. H. 35; Hicks v. Cram, 17 Vt. 449; Elder v. Thompson, 13 Gray, 91. That a variance may be taken advantage of on special demurrer, see Burgess v. Abbott, 1 Hill, N. Y. 135, where it was held that the objection could not be taken advantage of on general demurrer.

⁷ Mountstephen v. Brooks, 1 B. & Ald. 224.

there can be no recovery.¹ Now, however, under the enlarged liberty of amendment introduced by recent legislation, variances of this class can be relieved by amendment of declaration or writ, and the questions just noticed are no longer liable to occur.²

§ 834. If too many persons be made joint defendants, and this fact appear on the pleadings, this, at common law, is fatal on demurrer, or arrest of judgment, or writ of error.³ The recovery, when a joint debt is averred, must be against all or none, unless one or more of the defendants is removed from the record by setting up a purely individual defence, such as infancy or bankruptcy.⁴

Misjoinder
if una-
mended is
fatal.

¹ *Tuttle v. Cooper*, 10 Pick. 281; *Walcott v. Canfield*, 3 Conn. 194; *Livingston v. Tremper*, 11 Johns. 101. In *Gilman v. Rives*, 10 Pet. 298, it was held that in suits on recognizances, and obligations of record, where one is sued, and the declaration shows that another is justly bound, this is fatal on demurrer or arrest, if the plaintiff does not aver that the other party is dead; though a distinction is suggested between records and deeds.—In Virginia, this rule has been applied to suits on bonds; *Newell v. Wood*, 1 Munf. 555; *Newman v. Graham*, 3 Munf. 189; and in Maine, to suits on promissory notes. *Harwood v. Roberts*, 5 Greenl. 441; *S. P., Needham v. Heath*, 17 Vt. 224; see *McGregor v. Balch*, 17 Vt. 563; see, however, *contra*, *Neally v. Moulton*, 12 N. H. 485; *Harrow v. Dugan*, 6 Dana, 341; *McCreery v. Davis*, 9 B. Mon. 128. In *Lillard v. Bank*, 3 How. Mis. 78, it was said that if it appear from the record that the other contracting party was alive, the defendant may demur, but not otherwise; see *Geddis v. Hawk*, 10 S. & R. 33, and discussion in 1 Smith, L. C. 7th Am. ed. 874; in which work (p. 875), after a careful survey of older American cases, it is said: "These opinions are so discordant

and uncertain, that they cannot be considered as overthrowing a principle so clearly founded in reason, as that where a joint liability appears on the declaration in a suit against one, the non-joinder is fatal on general demurrer or in arrest of judgment. There are some cases in which the non-joinder of a joint contractor cannot be taken advantage of in any way whatever. Thus, though it seems to be assumed in the principal case (*Rice v. Shute*), that the non-joinder of a secret partner might be ground of a plea in abatement; and was, indeed, afterwards so decided in *Dubois v. Ludert*, 5 Taunt. 609; yet the case was soon disregarded in practice, and at last solemnly overruled: *Mullet v. Hook*, 1 M. & Mal. 88; *De Mautort v. Saunders*, 1 B. & Ad. 398; and, therefore, if issue be joined upon a plea in abatement of non-joinder, the jury are directed to consider *with whom had the plaintiff reason to believe that he contracted.*"

² Leake, 2d ed. 450.

³ Ch. on Pl. 16th Am. ed. 51; *Shirreff v. Wilks*, 1 East, 52; *Max v. Roberts*, 12 East, 94; *Cooper v. Whitehouse*, 6 C. & P. 545; *Whiting v. Cook*, 8 Allen, 63.

⁴ *Peebles v. Rand*, 43 N. H. 337; *Tuttle v. Cooper*, 10 Pick. 281; *Wal-*

§ 835. Supposing there be no agreement limiting their contributions, each joint debtor, who pays more than his share of the indebtedness, may call upon the others to contribute their proportionate shares.¹ Such payment, however, to entitle the party making it to recover from his co-debtors, must not be merely voluntary;² though it is not necessary, if the party paying was bound to pay, that he should have waited till judgment was entered against him.³

Joint debtor, paying more than his share, may recover from others.

IV. ASSIGNEES.

§ 836. The English common law, on grounds which it is not necessary here to discuss, does not permit the assignee of a contract to sue in his own name, though he is permitted to sue in the name of his assignor.⁴ Coke says the object was to discourage maintenance. Mr. Pollock regards the rule, and I think correctly, as “a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the debtor and the creditor.”⁵ In equity the right of the assignee to sue in his own name, was recognized at an early period; and the

Assignee by modern practice may sue.

cott v. Canfield, 3 Cow. 194; Jenkins v. Hunt, 2 Rand. 446.

¹ Kemp v. Finden, 12 M. & W. 421; Browne v. Lee, 6 B. & C. 689; Edger v. Knapp, 6 Scott, N. R. 707; Alexander v. Vane, 1 M. & W. 511; Boulton v. Peplow, 9 C. B. 493; Fletcher v. Grover, 11 N. H. 368; Taylor v. Savage, 12 Mass. 98; Chaffee v. Jones, 19 Pick. 264; Campbell v. Mesier, 4 John. Ch. 334; Doremus v. Selden, 19 Johns. 213; Smith v. Hicks, 1 Wend. 206; see Murray v. Bogart, 14 Johns. 318. That co-debtors are entitled to contribution, see *supra*, § 765; and see on this topic 1 Pars. on Cont. 32 *et seq.*

² Lucas v. Ins. Co., 6 Cow. 635, and cases cited *supra*, § 765.

³ Davies v. Humphreys, 6 M. & W. 153; Pitt v. Purssord, 8 M. & W. 538; Odlin v. Greenleaf, 3 N. H. 270; Chaffee v. Jones, 19 Pick. 260; Frith v.

Sprague, 14 Mass. 455. See *supra*, § 760, for other cases.

⁴ See Pollock, 3d ed. 224; Wolff v. Oxholm, 6 M. & S. 99; Winchester v. Hackley, 2 Cranch, 342; Guthrie v. White, 1 Dall. 268.

⁵ To the same effect is 2 Spence's Eq. Jur. 850. See Koch, Forderungen, 3, 348.—“The rule that a chose in action cannot be assigned, means in effect that no one can transfer to another the right to bring an action for such a claim in the name of the transferee or assignee. This holds good, whether the right to bring an action be only what may be called a possible right of action, such as A. has against X. the moment a contract is entered into by X. with him; or an actual right of action, such as A. has against X. when X. has broken a contract with A. or has done a wrong to A. Hence, the rule may

English judicature act of 1873, "creates a legal right modelled on the equitable right, but confined to cases where the assignment is absolute, and by writing under the hand of the assignor, and express notice in writing has been given to the debtor."¹ Independently of this provision, an assignee, in England, is empowered by statute to sue in his own name on

thus be stated: A. cannot transfer or assign to B. the right to sue X., so as to enable B. to sue X. in B.'s name, either on a contract made with A. or for a tort done to A." Dicey on Parties (Am. ed. 1879), 67. But "this nicety is not now so regarded as to render (an assignment) really ineffectual. It is, on the contrary, in substance, a valid and constant practice, although in accordance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And, therefore, where in common acceptance a debt or bond is said to be assigned over, it must still be sued in the original creditor's name, for the bringing of which suit the person to whom it is transferred has sufficient authority."

2 Steph. Com. 6th ed. 45, 46; cited Dicey, *ut supra*, 69; Gibson v. Cooke, 20 Pick. 17.—By the Roman law the assignment of a debt was not permitted. Micklenbruch, *Lehre von der Cession der Forderungsrechte*, 3 Auf. 1836; Schmid, *Grundlehren der Cession*, 1866; Puchte, in Weiske's *Rechts-Lex*. II. 636; Unterhölzner, I. 598; Vangerow, III. §§ 574-6; Windscheid, II. § 329. The reason given is that the intrusion of a new creditor changes the character of the duty arising from the debtor, and gives the contract a new quality. There is no such thing, so it was argued, as a contract to pay money without a dis-

tinctive payee, whose characteristics qualify the obligation. To strike out one payee and put in another, is to establish a new contract, requiring the consent of both parties. If a creditor, therefore, according to the old Roman law, wished to make over a debt due him to a third party, he could only do so by granting the use of his name to such third party. The "assignee" in such case is not an ordinary "procurator," but a procurator "in rem suam." This limitation, however, was not permanently applied. In the course of time, to adopt Windscheid's exposition (Wind. § 329), it became the general practice for the assignee to sue in his own name. The *actio*, to adopt the terms finally accepted, was *suo nomine*, but at the same time was an *actio utilis*, not *directa*. The principle that the *obligatio* continued to belong to the original creditor was adhered to; the change was that the *actio* to enforce this obligation, as well as the fruits of the obligation, were given to the assignee. This distinction, however, is no longer recognized in the modern Roman law, by which an assignee of a debt has the same *jus* as his assignor.

That a creditor cannot, without his debtor's consent, assign a part of his claim, see Beardslee v. Morgnor, 73 Mo. 22. As to divisibility see *supra*, §§ 233, 338, 511, 552; *infra*, §§ 899, 979.

¹ Pollock, 3d ed. 225. See Fairlie v. Denton, 8 B. & C. 395; Master v. Miller, 4 T. R. 340; Seddon v. Senate, 13 East, 73; McKinney v. Alvis, 14 Ill. 33.

"promissory notes, bills of lading, bail bonds, replevin bonds, administration bonds, life and marine policies of insurance, and choses in action belonging to companies within the company act."¹ Similar legislation exists in most jurisdictions in the United States. Generally, also, bills of exchange and promissory notes are assignable by custom;² but there must be an acceptance of bills to charge the acceptor, and "the holder of a cheque cannot maintain an action in his own name against the drawees, though they have sufficient funds of the drawer, if they refuse to accept it."³ It is also to be remembered that "the assignment of a debt may be effected in law so as to give a right of action to the assignee by means of a binding agreement between the assignor, the assignee, and the debtor, to the effect that the debt shall be discharged as against the assignor or original creditor, and a new liability created for the debt in favor of the assignee."⁴—At law, therefore, the old rule exists mainly in reference to sealed obligations, and to non-accepted drafts or orders, while in equity it has ceased to exist.⁵—In some states in this country, by statute, assignees are entitled in all cases to sue in their own names.⁶

§ 837. An assignment of a *chose in action* in itself implies a right to use the assignor's name. Hence after such an assignment, in states where the assignee cannot sue in his own name, he can sue in the name of the assignor.⁷ Want of interest in the nominal plaintiff cannot be shown to defeat the suit.⁸ Nor does it make any difference whether the chose in action is a

Assign-
ment au-
thorizes
use of as-
signor's
name.

¹ Dicey, *ut supra*, 117.

² *Ibid.*

³ Trunkey, J., *Saylor v. Bushong*, 12 Weekly Notes, 81, citing *Bank of the Republic v. Millard*, 10 Wall. 152; *Carr v. Bank*, 107 Mass. 45. See *Ætna Bank v. Nat. Bank*, 46 N. Y. 82.

⁴ Leake, 607, adopted in Dicey, *ut supra*, 118; *infra*, § 852.

⁵ 2 Story's Eq. Jur. § 1040 *et seq.*

⁶ See Ch. on Pl. 16th Am. ed. (1879) 17; *Aldricks v. Higgins*, 16 S. & R. 212; *Cox v. Hill*, 6 Md. 274; *Prioleau v. Bank*, 16 Ga. 582; *Smith v. Schibel*, 19 Mo. 140; *Mills v. Murry*, 1 Neb. 327;

Worthington v. Curd, 15 Ark. 491. In New Jersey, the assignment must be for a valuable consideration. *Andrews v. Rue*, 34 N. J. L. 402.

⁷ *Supra*, § 526; Ch. on Pl. 16th Am. ed. 17; *Winchester v. Hackley*, 2 Cranch, 342; *Smith v. Berry*, 18 Me. 122; *Halloran v. Whitcomb*, 43 Vt. 306; *Clark v. Swift*, 3 Met. 392; *Parkhurst v. Dickerson*, 21 Pick. 307; *Moore v. Coughlin*, 4 Allen, 335; *Lyon v. Summers*, 7 Conn. 399; *Jessel v. Ins. Co.*, 3 Hill, 88; *Norris v. Douglass*, 2 South. 817; *McKinney v. Alvis*, 14 Ill. 33.

⁸ *Raymond v. Johnson*, 11 Johns. 488.

written or parol contract, or an express or implied promise.¹ Whenever the assignment is valid, the assignee can sue in his assignor's name, if not in his own. In suits on insurance policies the assignor's name need not be used. "Upon an order, endorsed on the policy, to pay in case of loss to a third party, accepted by the company, or assented to by them, the payee may maintain an action, in his own name, on setting out the facts in his declaration."²

§ 838. From what has been just said, the distinction between assignability and negotiability is marked. If a promissory note be made by X. payable to A. or order, and A. endorses it to D., D. is entitled to recover from X. without proof of consideration. If the suit were on an assignment instead of an endorsement, it would be necessary for the plaintiff to prove, (1) consideration, and (2), the fact that notice of the assignment had been given by him to the debtor. Negotiability excludes equities; assignability is subject to them. Negotiability gives the holder often a better title than the assignor, as where a *bona fide* holder takes a note tainted with fraud or gambling.³ But, supposing there be no notice cutting off subsequent transactions between the original debtor and the original creditor, the assignee stands in the original creditor's shoes.⁴

§ 839. No particular form is necessary, as a general rule, to constitute an assignment of a debt.⁵ When negotiable paper is payable to order, an endorsement is necessary to pass the title; but when payable to bearer, mere delivery is sufficient.⁶ An order by the creditor

¹ Clarke v. Thompson, 2 R. I. 146; Currier v. Hodgdon, 3 N. H. 82.

² May on Ins. 2d ed. § 447; Chamberlain v. Ins. Co., 55 N. H. 249; Barrett v. Ins. Co., 7 Cush. 75; Lowell v. Ins. Co., 8 Cush. 127; Loring v. Ins. Co., 8 Gray, 28; Hastings v. Ins. Co., 73 N. Y. 141; Hartford Ins. Co. v. Olcott, 97 Ill. 439; see *supra*, § 526.

³ Anson (Am. ed. 1880), 215, citing Conard v. Ins. Co., 1 Pet. 386; Peters v. Balistier, 3 Pick. 495.

⁴ As to negotiable paper, see *supra*, § 795; as to bills of lading, see *supra*, § 793; that outside of these exceptions a party without title cannot pass title see *supra*, §§ 292, 734, 793.

⁵ 2 Story Eq. Jur. §§ 1043 *et seq.*; Ryall v. Rowles, 1 Ves. 348; Morton v. Naylor, 1 Hill, N. Y. 583.

⁶ Jones v. Witter, 13 Mass. 307; Freeman v. Perry, 22 Conn. 617; see *supra*, § 795.

of any kind (unless there be a statutory limitation) will carry the debt, if properly served on the debtor. The first essential is that the order should be from the creditor to whom the debt is payable.¹ Nor is it any longer necessary that the assignment should be by an instrument of the same solemnity as that which secured the original debt.² It is enough if there be a transfer of the security, with directions to the debtor to pay to the assignee.

§ 840. In equity, and now at law in England and in those states which have adopted equity practice in common law procedure, it is not necessary, in order to enable the assignee to sue in his own name, that the debtor should assent to the assignment.³ Nor is the debtor's assent necessary to the assignment of negotiable paper, or to assignments in the other excepted cases noticed.⁴ But wherever the suit is brought in the assignee's name, then (outside of these and other excepted cases) it is necessary, to sustain the suit, that there should be a contractual relation established between the debtor and the assignee.⁵ But, as has been already seen,

Debtor's
assent con-
stitutes
contractual
relation.

¹ Rodick v. Gandell, 1 D. M. & G. 763.

² Porter v. Bullard, 26 Me. 448; Dennis v. Twitchell, 10 Met. 180.

³ See Bell v. R. R., 15 Beav. 548; Spring v. Ins. Co., 8 Wheat. 268; McKinney v. Alvis, 14 Ill. 33.

⁴ *Supra*, §§ 795 *et seq.*

⁵ Williams v. Everett, 14 East, 582; Mandeville v. Welch, 5 Wheat. 277; Tiernan v. Jackson, 5 Pet. 597; Saylor v. Bushong, cited *supra*, § 836.

Whether the original creditor can revoke the assignment, after a mere notice to the debtor, has been much discussed. On the principle stated in the text (*supra*, §§ 784 *et seq.*), it is essential, to establish a binding contractual relation, that the parties to such relation should concur in the specific agreement. If it is intended that the indebtedness of C. to A. should be extinguished, and an indebtedness

from C. to B. is to take its place, A., B., and C. should concur in the contract by which this intention is carried out. See Wilson v. Coupland, 5 B. & Al. 228; Wharton v. Walker, 4 B. & C. 164; Owen v. Bowen, 4 C. & P. 93; Mowry v. Todd, 12 Mass. 284; Gibson v. Cooke, 20 Pick. 15; Pickens v. Hathaway, 100 Mass. 247; and other cases cited Story on Cont. § 483. That the agreement between a substituted debtor and an original debtor may be rescinded at any time before the acceptance of the substitution by the original creditor, see Trimble v. Strother, 25 Oh. St. 378; Durham v. Bischoff, 47 Ind. 211.

In Owen v. Bowen, 4 C. & P. 93, where D. deposited with B. money to be paid to C., it was held that unless C. had agreed with D. and B., either directly or indirectly, D. could recover the amount of the deposit from B. On the other hand, it has been held that

the nature of the transaction may be such as to imply assent beforehand to any assignment the creditor may make; in other words, the debtor may make the creditor his agent to convey his (the debtor's) assent to an assignment by the creditor.¹ And, in any view, the debtor's assent may constitute a contractual relation between the debtor and the assignee.² Such assent may be inferred from the acts of the parties and the circumstances of the case.³ A banker, for instance, who knowingly retains money left by a depositor to meet a particular cheque, may be inferred to have assented to the negotiability of the cheque, and becomes, therefore, liable to the holder.⁴ —If it be said that the extension in this way of the right of assignees to sue militates against the principle heretofore announced that no one should become my creditor without my assent, the answer may be repeated, that the case of an assignee suing me on an indebtedness to which I consented is very different from that of a volunteer creditor suing me on a debt to which I gave no assent at all. The first is an incident to a contract which I instituted; the second is the imposition on me of a contract with which I have had nothing at all to do.⁵ —Wherever there has been a promise by the defendant, then, on the principles of novation, there being an adequate consideration, suit may be brought by the assignee independent of the statutes.⁶

§ 841. As has been elsewhere shown,⁷ the question whether

the debtor's assent is sufficient to destroy the right of the original creditor to revoke the deposit. *Weston v. Barker*, 12 Johns. 281; *Neilson v. Blight*, 1 Johns. Cas. 205; and other cases cited *Story on Cont.* § 483. But at common law, aside from statute, the original contract can only be destroyed by mutual consent.

¹ *Supra*, §§ 836 *et seq.*; *Israel v. Douglass*, 1 H. Bl. 242; *Crocker v. Whitney*, 10 Mass. 316.

² *Tibbits v. George*, 5 Ad. & El. 115; *De Bernales v. Fuller*, 14 East, 590 n; *Warren v. Wheeler*, 21 Me. 484; *Mowry*

v. Todd, 12 Mass. 281; *Story on Cont.* § 471.

³ *Doty v. Wilson*, 14 John. 378; *Barger v. Collins*, 7 Har. & J. 213.

⁴ *Saylor v. Bushong*, 12 Weekly Notes, 81; see *Tibbits v. George*, 5 Ad. & El. 115; *Carrier v. Hodgdon*, 3 N. H. 32; *Edson v. Fuller*, 22 N. H. 191; *Crocker v. Whitney*, 10 Mass. 316; *Doty v. Wilson*, 14 Johns. 378; *Commercial Bank v. Hughes*, 17 Wend. 94.

⁵ *Supra*, § 787.

⁶ *Infra*, § 852; *Cromelien v. Mauger*, 17 Penn. St. 169; *De Barry v. Withers*, 44 Penn. St. 356.

⁷ *Wh. Con. of L.* § 735; *supra*, § 796.

an assignment is formally valid is to be decided by the *lex fori*. It is a mere matter of process. If allowed by the *lex fori*, the assignee may sue in his own name, although forbidden by the foreign law to which the obligation is subject.¹ But if an assignee cannot, in such cases, sue by the *lex fori*, the fact that he could have sued under the *lex loci contractus*, will not relieve him from his disability.²—If the mode of assignment pointed out by a statute be not pursued, only an equitable interest vests in the assignee, and the suit must be by the assignor to his use.³—Mere endorsement of a certificate of deposit in a savings fund will not entitle the endorsee to bring suit in his own name.⁴—Whether paper is so far negotiable as to sustain a suit by the holder has been already considered.⁵

Lex fori determines whether assignee can sue in his own name.

§ 842. An assignee of non-negotiable assets takes only what the assignor has to give; and hence, whatever equities the debtor might assert against the assignor at the time of the assignment he can assert against the assignee.⁶ “That the purchasers of non-negotiable demands, like the certificate here (a certificate of

Assignment subject to equities between assignor and debtor

¹ Foss v. Nutting, 14 Gray, 484.

² *Supra*, § 526; Fisk v. Brackett, 32 Vt. 798; Usher v. D'Wolf, 13 Mass. 290; McRae v. Mattoon, 10 Pick. 49; Hay v. Green, 12 Cush. 282; Leach v. Green, 116 Mass. 536; see Wolf v. Oxholm, 6 M. & S. 99; Folliott v. Ogden, 1 H. Black. 131; Jeffery v. M'Taggart, 6 M. & S. 126; Levy v. Levy, 78 Penn. St. 507; Murrell v. Jones, 40 Miss. 565; Tully v. Herrin, 44 Miss. 626.

³ Troub. & Haly Prac. by Brightly, § 1664; Bunting v. R. R., 81 Penn. St. 254; cited *supra*, § 797. In Massachusetts the only cases in which a third person has the exclusive right to the control of an action at law is when he has acquired the whole interest of the nominal plaintiff. Coffin v. Adams, 131 Mass. 133; citing Foss v. Lowell Bank, 111 Mass. 285.

⁴ Loudon Saving Fund v. Bank, 36 Penn. St. 498; see *supra*, §§ 797, 836.

⁵ *Supra*, § 795.

⁶ Wh. Con. of L. §§ 364 *et seq.*; Ch. on Pl. 16th Am. ed. (1879) 17; Pollock, 3d ed. 227–9; Pinkett v. Wright, 2 Hare, 120; Murray v. Pinkett, 12 Cl. & F. 784; Ford v. White, 16 Beav. 120; Clack v. Holland, 19 Beav. 262; Littlefield v. Smith, 17 Me. 327; Bartlett v. Pearson, 29 Me. 9, 15; Dix v. Cobb, 4 Mass. 508; Clarke v. Hawkins, 5 R. I. 219; Aldrich v. Campbell, 4 Gray, 284; Vanbuskirk v. Ins. Co., 14 Conn. 141; Murray v. Lylburn, 2 Johns. Ch. 441; Noble v. Oil Co., 76 Penn. St. 354; Sharts v. Awalt, 73 Ind. 304; Ellis v. Sisson, 96 Ill. 105; see Paine v. Lester, 44 Conn. 196; Pond v. Cooke, 45 Conn. 130; and other cases cited Wh. Con. of L. §§ 334 *et seq.* 359, and see for further cases, *infra*, §§ 1021 *et seq.*

indebtedness by a duly constituted public officer) from others than the original owner of them, can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim, is established by all the authorities."¹ "Where there is a *chose in action*, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds the debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor."² After assignment debts due by the assignee to the defendant may be set off.³ The assignee of a debt is, therefore, put in the same position as is an undisclosed principal suing on a debt contracted by his agent. He is entitled to recover, but whatever he recovers is subject to any set-off or counter-claim due from the debtor to the creditor in the original transaction. The assignee takes the debt burdened with such set-offs or counter-claims.⁴ If, also, the claim is open to avoidance, when held by the assignor, the debtor can avoid it to the same extent when it is in the hands of the assignee.⁵ When, however, a claim is *bona fide* assigned for a sufficient consideration, and notice of this is given to the

¹ Field, J., *Cowdrey v. Vandenberg*, 101 U. S. 575. That such an assignment may be of a future contingent interest (*e. g.* of a policy of life insurance), see *Phipps v. Lovegrove*, L. R. 16 Eq. 80; see to same effect *Ingraham v. Disbrough*, 47 N. Y. 421; *Davis v. Bechstein*, 69 N. Y. 440.

² James, L. J., *Phipps v. Lovegrove*, L. R. 16 Eq. 80, 86; S. P., Lord St. Leonards, *Mangler v. Dixon*, 3 H. L. C. 702; *Gochenauer v. Cooper*, 8 S. & R. 187; *Faull v. Tinsman*, 36 Penn. St. 108; *Finnell v. Nesbit*, 16 B. Mon. 351; and see *Morrow v. Bright*, 20 Mo. 298. *Pickering v. R. R.*, L. R. 3 C. P. 235, holds that "a creditor of A. who becomes entitled by operation of law to appropriate any beneficial interest of A.'s (whether an equitable interest in

property or a right of action) for the satisfaction of his debt, can claim nothing more than such interest as A. actually had, and he can gain no priority by notice to A.'s trustee or debtor even in cases where he might have gained it if A. had made an express and unqualified assignment to him." This decision is stated by Mr. Pollock (3d ed. 229) to virtually overrule *Watts v. Porter*, 3 E. & B. 743.

³ *Infra*, §§ 1020 *et seq.*

⁴ *Cavendish v. Geaves*, 24 Beav. 163; *Mitchell v. Winslow*, 2 Story, 630; *Hooper v. Brundage*, 22 Me. 460; *Trustees v. Wheeler*, 61 N. Y. 88; *Wood v. Mayer*, 73 N. Y. 556; *Metzgar v. Metzgar*, 1 Rawle, 227; see *infra*, § 1025.

⁵ *Graham v. Johnson*, L. R. 8 Eq. 36.

debtor, then any payment by him to the assignor will be regarded as collusive and inoperative.¹

§ 843. It is elsewhere shown that three theories have been advanced as to the law to which a debt is subject : 1, that of the *lex loci contractus* ; 2, that of the debtor's domicile ; and, 3, that of the creditor's domicile.² The prevailing and better theory is that the law of the creditor's domicile is to control.³ But so far as concerns the form and practice of set-off, the *lex fori* decides.⁴

Equities to be determined by the law to which the debt is subject.

§ 844. To enable the original debtor to set off against the assignee a debt due the original assignor the debt must be due at the time of the assignment.⁵ In other words, none but actionable debts can be set off.⁶ Hence no set-off acquired against the assignor, after notice of the assignment, is good against the assignee.⁷ Nor will a release by the assignor, or any other hostile action on his part, after due notice has been given, affect the assignee's claim.⁸

Set-off must be due at time of assignment.

¹ See *Stephens v. Venables*, 30 Beav. 625 ; *Watson v. R. R.*, L. R. 2 C. P. 593.

² Wh. Con. of L. §§ 360 *et seq.*

³ *Smith v. Buchanan*, 1 East, 6 ; *Caskie v. Webster*, 2 Wal. Jr. 131 ; *Braynard v. Marshall*, 8 Pick. 194 ; *Mead v. Dayton*, 28 Conn. 33 ; *Clark v. Peat Co.*, 35 Conn. 303 ; *Pond v. Cooke*, 45 Conn. 132 ; *Goodwin v. Holbrook*, 4 Wend. 377 ; *Guillander v. Howell*, 35 N. Y. 657 ; *Speed v. May*, 17 Penn. St. 91 ; *Poe v. Duck*, 5 Md. 1 ; *Keyser v. Rice*, 47 Md. 203 ; *Klein v. French*, 57 Miss. 662. In *Kirtland v. Hotchkiss*, 100 U. S. 491, Harlan, J., speaking of a debt due from a person domiciled in one state to a person domiciled in another, said : "That debt, although a species of intangible property, may, for the purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor."

⁴ *Supra*, § 841 ; *infra*, §§ 1009 *et seq.*

⁵ *Infra*, §§ 1021-5. As to release,

see *infra*, § 1038. *Hutchinson v. Reed*, 3 Camp. 329 ; *Gledstane's case*, L. R. 1 Ch. 538 ; *Rawley v. Rawley*, L. R. 1 Q. B. D. 460 ; *Avery v. Russell*, 125 Mass. 571 ; *Martin v. Kuntzmuller*, 37 N. Y. 396 ; *Roberts v. Carter*, 38 N. Y. 107 ; *Fuller v. Steiglitz*, 27 Oh. St. 355 ; *Williams v. Helme*, 1 Dev. Eq. 151.

⁶ *Infra*, § 1017.

⁷ *Winch v. Keeley*, 1 T. R. 619 ; *Weeks v. Hunt*, 6 Vt. 15 ; *Blake v. Buchanan*, 22 Vt. 548 ; *Halloran v. Whitcomb*, 43 Vt. 306 ; *Upton v. Moore*, 44 Vt. 552 ; *Dix v. Cobb*, 4 Mass. 508 ; *Goodwin v. Cunningham*, 12 Mass. 193 ; *Bush v. Lathrop*, 22 N. Y. 535 ; *Roberts v. Carter*, 38 N. Y. 107. See, also, *Greene v. Darling*, 5 Mason, 201 ; *Bartlett v. Pearson*, 29 Me. 9 ; *Willis v. Twambly*, 13 Mass. 204.

⁸ *Alner v. George*, 1 Camp. 392 ; *Dix v. Cobb*, 4 Mass. 508 ; see *Webb v. Steele*, 13 N. H. 230.

Notice to
debtor of
assignment
necessary
to protect
assignee.

§ 845. To protect the assignee it is proper that notice should be given of the assignment to the debtor. If he should pay innocently, without notice, the original creditor, after the assignment, however fraudulent the reception of the money may be on the part of the original creditor, the payment will preclude a recovery by the assignee from the debtor on the same debt.¹ The same protection is given to the debtor should he pay *bona fide* to the assignee of whose assignment he is first informed.²—By the Roman law, prevailing in Scotland, an assignment does not operate until notice to the debtor, and an attachment after the assignment, but prior to notice to the debtor, overrides the assignment. By the English law, the assignment, so it has been held, works an equitable transfer of the debt as against attaching creditors without notice. It has been held in England that if a debt due by a Scotch debtor to an English creditor be assigned in England, the debt is equitably transferred to the assignee as against a subsequent Scotch attaching creditor, though the notice to the debtor of the assignment was not given until after attachment laid.³ It was subsequently held that the claims of competing assignees, incumbrances, and attaching creditors rank from the time of notice to the debtor;⁴ although, when local statutes give priority of attachments according to date of imposition, priority must be determined by the law of the creditor's domicil.⁵—It has been recently ruled in England that a second assignee who takes not from the original creditor, but from his legal personal representative,

¹ Pollock, 3d ed. 226; *Stocks v. Sill v. Worswick*, 1 H. Bl. 691; *Story*, Dobson, 4 D. M. G. 11; *Felch v. Bugbee*, 48 Me. 9; *Adams v. Leavens*, 20 Conn. 73; *Heermans v. Ellsworth*, 64 N. Y. 159; *Hinkley v. Walter*, 8 Watts, 260; 9 Watts, 179; *Gaullagher v. Caldwell*, 22 Penn. St. 300; *Miller v. Bomberger*, 76 Penn. St. 78.

² *Stocks v. Dobson*, 4 D. M. G. 11, 17; see *Willes, J.*, L. R. 5 C. P. 594; and see generally *Pass v. McRea*, 36 Miss. 143.

³ *Stocks v. Dobson*, 4 D. M. G. 11, 17; see *Willes, J.*, L. R. 5 C. P. 594; and see generally *Pass v. McRea*, 36 Miss. 143.

⁴ *Solomons v. Ross*, 1 H. Bl. 131, *u.*;

Sill v. Worswick, 1 H. Bl. 691; *Story*, Con. of L. §§ 395–6; and see comments in Wh. Con. of L. § 364.

⁴ *Loveridge v. Cooper*, 3 Russ. 1, 38, 48, and cases cited *Wald's Pollock*, 204; *Foster v. Cockerell*, 3 Cl. & F. 456; see *Judson v. Corcoran*, 17 How. 612; *Spain v. Hamilton*, 1 Wall. 604.

⁵ See *Braynard v. Marshall*, 8 Pick. 194; *Thayer v. Daniels*, 113 Mass. 129; *Muir v. Schenck*, 3 Hill, 228; *Guillander v. Howell*, 35 N. Y. 657.

may in like manner gain priority by notice.¹—The notice is to be given to the debtor either in person or through his agent employed by him to make payment;² and notice to one of two trustees is sufficient.³ No specific form is necessary for a notice. It is enough if the fact be put before the debtor in such a way as would lead a business man of ordinary prudence to take cognizance of it.⁴—So far as concerns the debtor, or his bankrupt assignee, if there be no conflict as to assignments or attachments, no notice is necessary.⁵

§ 846. It is open, however, to the parties to a contract to provide that in the hands of an assignee no set-off between the parties should be permitted.⁶ In law the debtor may preclude himself by means of estoppel from setting up a set-off or counter-claim,⁷ “which,” comments Mr. Pollock, “really comes to the same thing, the doctrine of estoppel being a more technical and definite expression of the same principle.”⁸ It has been consequently held that when there are transferable indentures

Parties may contract to assign free from equities.

¹ Freshfield's Trusts, L. R. 11 Ch. D. 198.

² Addison v. Cox, L. R. 8 Ch. 76-9.

³ Pardee v. Platt, 20 Conn. 402.

⁴ Lloyd v. Banks, L. R. 3 Ch. 488; Duncklee v. Mill Co., 3 Fost. 245. See generally as to necessity of notice, 2 Story's Eq. Jur. § 1047; Williams v. Sorrell, 4 Ves. 389; Mangles v. Dixon, 3 H. L. C. 702; Rodick v. Gandell, 1 D. M. & G. 763; Ward v. Morrison, 25 Vt. 595; Jones v. Witter, 13 Mass. 304; Commercial Bank v. Colt, 15 Barb. 506.

When a debt was due from a person domiciled in Connecticut to a person domiciled in Massachusetts, and this debt was attached in Connecticut by a creditor of the payee, and the payee, between laying the attachment and judgment thereon, made an assignment, the attachment was held in Connecticut to take the debt as against the assignment, although it would have been otherwise under the law of Massachusetts. Upton v. Hubbard, 28

Conn. 274; So. Boston Iron Works v. Locomotive Works, 51 Me. 585.

⁵ Burn v. Carvalho, 4 M. & Cr. 690; Freshfield's Trusts, L. R. 11 Ch. D. 198; Thayer v. Daniels, 113 Mass. 129; Muir v. Schenck, 3 Hill, 228; Spain v. Hamilton, 1 Wall. 604. With regard to foreign bankrupt assignments, see Wh. Con. of L. § 390.

⁶ Asiatic Banking Co. *ex parte*, L. R. 2 Ch. 391. In this case Lord Cairns said: “Generally speaking, a *chose in action* assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature of the terms of the contract that it must have been intended to be assignable free and unaffected by such equities.” See *supra*, §§ 141, 795-797.

⁷ Webb v. Herne Bay, L. R. 5 Q. B. 642; § 796-7.

⁸ Pollock, 3d ed. 231.

subject to such limitation, the holder takes them free from any equities between the original parties. And a limitation to this effect has been held to exist where, in pursuance of an antecedent agreement, debentures are issued, payable to the holder or bearer,¹ and where the debenture is put in the form of negotiable paper.² But this implication does not arise merely from the fact that the debenture is made payable to holder or bearer.³—That such debentures are issued in blocks, consisting of a series separately numbered, and that the object of the issue was to raise money in the market, are ingredients in determining the question whether the issuer of the debentures has estopped himself from setting up equities personal to himself against the holder.⁴ But in England the original parties to such debentures cannot turn them permanently into negotiable instruments by an agreement that the debts of the original creditor should not be set off against any subsequent assignee. This agreement does not by its own force operate to enable an intermediate holder against whom equities exist to transfer a title free from such equities.⁵

§ 847. A party, also, taking an order for the delivery of goods, takes it free from any equities existing between the original parties to the contract, whenever this was the understanding between such parties. And the rule applies to all securities or vouchers for a debt payable in money.⁶

§ 848. When the assignee of an executory contract can perform the duty imposed by it as effectively as could the assignor, the fact that this duty is personal cannot be set up

¹ *New Zealand Co. ex parte*, L. R. 3 Ch. 154; see *Colborne ex parte*, L. R. 11 Eq. 478; *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374; see *Railroad Co. v. Howard*, 7 Wall. 392, where this inference is doubted as a universal rule.

² *City Bank ex parte*, L. R. 3 Ch. 758.

³ *Financial Corporation's Claim*, L. R. 3 Ch. 154, and see *supra*, § 795-7.

⁴ *Dickson v. Swansea R. R.*, L. R. 4 Q. B. 44; *Higgs v. Tea Co.*, L. R. 4

Ex. 387; *Universal Life Asso. Co.*, L. R. 10 Eq. 458; *Chorley ex parte*, L. R. 11 Eq. 157; and other cases cited *Pollock*, 3d ed. 233. Mr. Pollock doubts whether *Graham v. Johnson*, 8 Eq. 36, and *Athenæum Ass. v. Pooley*, 3 De G. & J. 294, can be reconciled with the above.

⁵ *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

⁶ *Merchant Bank v. Bessemer Steel Co.*, L. R. 5 Ch. D. 205.

by defendant in a suit by the assignor on the contract.¹ It is otherwise, however, when the duty, a condition precedent to the contract becoming effective, is one which can be performed only by the assignor, he declining to perform such duty.² Contracts of partnership, also, are not assignable;³ and so of contracts to perform professional services.⁴

To a suit on assignment it is a defence that assignor failed to perform condition precedent.

¹ *British Waggon Co. v. Lea*, L. R. 5 Q. B. D. 149; *Roorbach v. North*, 6 Johns. Ch. 469; *Horner v. Wood*, 23 N. Y. 350; *Devlin v. Mayor*, 63 N. Y. 8, 16; *Parsons v. Woodward*, 22 N. J. L. 196; *Philadelphia v. Lockhardt*, 73 Penn. St. 211.

² See *supra*, § 323.

In *British Waggon Co. v. Lea*, L. R. 5 Q. B. D. 149, Cockburn, C. J., giving the judgment of the court (Jan. 13, 1880), said: "We entirely concur in the principle on which the judgment in *Robson v. Drummond*, 2 B. & Ad. 303, rests, namely, that where a person contracts with another to do work and perform service, and it can be inferred that the person employed has been selected with regard to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the

person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But the principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendant attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work."

³ *Lind. on Partner.* 492; *Pearce v. Chamberlain*, 2 Ves. Sen. 33; *supra*, § 323.

⁴ *Farren v. Wilson*, L. R. 4 C. P. 744; *Hayes v. Willis*, 4 Daly, 259, and cases cited *supra*, § 323; see on this topic Mr. Moak's note to 24 Eng. Rep. 241.

CHAPTER XXVII.

NOVATION.

Novation is the substitution of a new in the place of an old contract, § 852.	Only parties to a contract may sue or be sued on it, § 859.
A new contract is essential to novation, § 853.	Extinguishment may be by merger, § 860.
Consent of the creditor is essential, § 854.	Novation may be proved by parol, § 861.
And so of consent of other parties, § 855.	Novation applied to partnership, § 862.
To novation points of change are immaterial, § 856.	Retiring partners not discharged by acceptance of new firm, § 863.
Whether old agreement is extinguished depends on construction, § 857.	Insurance may devolve duties on assignee, § 864.
Must be consideration for agreement of substitution, § 858.	Novation within statute of frauds, § 865.

§ 852. NOVATION is the substitution of a new in the place of an old contract. The *novation* of a contract is distinguished from the *rectification* of a contract in this, that in rectification the old contract is restored by a correction of mistakes of expression, while in novation a new contract is created.¹ The efficacy of novation is primarily due to the action of the creditor. The creditor consents to the rescission of the old contract and the substitution of a new contract. Novation is to be distinguished, therefore, from release,² in the fact that it works not the

¹ Dig. 46, 2 Cod. 8, 42 de nova. et deleg. Several German treatises have appeared on this topic: Gneist, die formellen Verträge (1845); Fein, Beiträge zu der Lehre von der Novation und Delegation (1855); Kniess, Einfluss der bedingten Novation auf die ursprüngliche Obligation (1860); Römer, die bedingte Novation (1863); Salpius, Novation und Delegation (1864); Salkowski, zur Lehre von der Novation (1866). It is discussed also by Vangerow, § 619, and Windscheid, § 353, on whom I chiefly rely for the distinctions in the text. An article on the topic in the text will be found in 3 Am. Law Reg. N. S. 65. Rectification, as distinguished from novation, is discussed *supra*, § 205.

² *Infra*, § 1031.

termination of the contractual relation, but a substitution of contracts; while it differs from rectification in the fact that the change it produces is not partial, but total. In every respect the new agreement starts fresh. It is not part old and part new. It is new throughout, and the obligations it creates emanate, as to time and place, from itself. So far as concerns our own distinctive law, any increment of security, passing from one party to another, no matter how slight, and no matter how largely it may be apparently outweighed by surrenders on the other side, will be sufficient to sustain the substitution.¹—Whether the novation is so far perfected as to relieve the original debtor depends in part on the terms of the first agreement, in part on those of the second. It may be that by the first agreement the original debtor is to be bound only as long as he retains certain property or bears certain relations to the original creditor; and if so there is a release of the original debtor on the happening of the contingency on which his indebtedness is to cease. Or it may be that by the second agreement the original debtor is expressly released. But in any view, novation, in its true sense, does not exist unless the old agreement is discharged and a new agreement executed to take its place.²

¹ *Supra*, §§ 516 *et seq.*; *infra*, § 853; Leake, 2d ed. 790. See comments by Lord Westbury in *Blundell's case*, reported in 7 London Law J. 772.

² "There may be in some cases a change of credit by agreement between the parties so as to transfer the liability from the original contracting party to another, or to one only of the original contracting parties." Ch. on Pl. 16th Am. ed. 55, citing *Evans v. Drummond*, 4 Esp. 91; *Tappen v. Martens*, 8 T. R. 451; *Gouthwaite v. Duckworth*, 12 East, 421.

That by consent of all parties the old agreement may be extinguished and a new agreement instituted in its place, see *Wilson v. Coupland*, 5 B. & Al. 228; *Evans v. Powis*, 1 Exch. 601; *Sard v. Rhodes*, 1 M. & W. 153; *Good v. Cheeseman*, 2 B. & Ad. 328; *Jenness*

v. Lane, 26 Me. 475; *Woodward v. Miles*, 24 N. H. 289; *Babcock v. Hawkins*, 23 Vt. 561; *Andrews v. Campbell*, 36 Oh. St. 361; *Flanagin v. Hambleton*, 54 Ind. 222; *Lister v. Clark*, 48 Iowa, 169; *Drake v. Hill*, 53 Iowa, 37; *Shaffer v. McKanna*, 24 Kan. 22; *Baker v. Frellson*, 32 La. An. 822. See *Morris v. Harveys*, 75 Va. 726; and cases cited *infra*, §§ 853, 996, and see *Story Eq. Jur.* § 1355.

In *Wharton v. Walker*, 4 B. & C. 164, *Bayley, J.*, in a case of alleged substitution of a new debtor for an old, said: "If, by an agreement between the three parties, the plaintiff had undertaken to look to the defendant and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on the agreement; but in order to

A new contract essential to novation.

§ 853. Hence, the first essential to novation is the formation of a new contract. No particular form for this purpose is required in the Roman

give him that right of action there must have been an extinguishment of the intermediate debt."

In *Babcock v. Hawkins*, 23 Vt. 561, it was held that an agreement with a sufficient consideration to substitute a new contract in place of an old contract extinguishes the old contract, whether the new contract was ever performed or not.

In *Cadens v. Teasdale*, 53 Vt. 469, it was held that where, by agreement between the original debtor and creditor and a third party, the third party was accepted in the original debtor's place, the risk of the insolvency of the third party fell on the creditor. "The plaintiffs," said Taft, J., "having a claim against the defendant, agreed if the defendant would procure one Oliver, a debtor of the defendant, to give the plaintiffs his (Oliver's) note on four months' time, that they would take it in payment of so much of the defendant's account. The agreement was accepted and the contract consummated. At the time all the parties believed that Oliver was solvent. He was in fact insolvent, failing before the maturity of the note, and nothing was realized by the plaintiffs upon it. The plaintiffs now seek to recover of the defendant the original account. The question presented is, Upon whom was the risk of the insolvency of Oliver? In *Wainwright v. Webster*, 11 Vt. 576, the court say, that where the note of a third person is received in payment of a precedent debt, the risk of the insolvency of the maker is upon the party from whom the paper is received, unless there is an *express agreement* that the risk of the paper, in this respect, is to be the receiver's, or one is to be

implied from the facts and circumstances of the case. In the case at bar, the defendant, at the time of the transaction, had simply an account, the collection of which he could enforce *in presenti*. Upon application to Oliver for money with which to pay the plaintiffs, it was arranged between the parties that Oliver should give his note to the plaintiffs, and they should accept it in lieu of their claim against the defendant. The note was given and the right to enforce the collection of the defendant's debt against Oliver was suspended for the life of the note. We regard the transaction as a substitution of the debt against Oliver for the one against the defendant; and that it was the intention of the parties that the defendant should be discharged from his indebtedness, and from any claim on account of the insolvency of Oliver; from the facts and circumstances in the case, we think such was the intention. The taking of a note, either of the debtor or of a third person, upon an open account, is *prima facie* payment of such account, upon the presumption that such is the intention of the parties at the time. The intention of the parties upon the question presented in this case should be held as equally decisive, as upon the question of payment. Finding that it was the intention of the parties, from all the facts and circumstances of the transaction, that the risk of Oliver's insolvency should be borne by the plaintiffs, the case is brought within the exception to the general rule as stated by Bennett, J., in the case cited, and the result is the judgment of the county court is affirmed."

law; no particular form is required in our own law, unless prescribed by the statute of frauds. The new contract, however, as we will presently see more fully, must be on a sufficient consideration. That consideration may, as a mere matter of abstract calculation, be more or it may be less than that of the contract which is superseded.¹ The old contract may appear superficially much more beneficial to the creditor than the new contract. A much less sum payable to-day may be taken instead of a much larger sum payable next week. A sum half the old amount with a new endorser may be accepted in the place of the old debt without that endorser. It is the element of time in the one case, and of a new security in the other case, that makes the consideration and counterbalances the diminution on the face of the debt.²—In our own law, novation of this class falls under the head of accord and satisfaction, and is subject to the same rules.³ No matter how slight may be the additional security, or how small the time gained, it is a sufficient consideration for the substitution of the new contract for the old. But to effect the novation,—in other words, to work this substitution—a valid contract must be made. When a new debtor comes in, the consideration, so far as concerns the creditor, is this new security, to the detriment of the new debtor; the consideration, so far as concerns the new debtor, is the detriment to the creditor arising from the withdrawal of the old debtor.⁴—The new contract, according to Roman law, may be one on which immediate legal process cannot be issued, as where the new debtor is a minor,⁵ or may be in other respects open to impeachment; yet if the old creditor accepts the novation in ignorance of such a defect, it being concealed from him, he is entitled to have the novation set aside, and a restitution of the old contract decreed.⁶ That the debt on the new contract may not be immediately payable does not, of itself, affect the

¹ See *infra*, § 858.

² See Gneist, *op. cit.* 229.

³ See *infra*, §§ 996 *et seq.*

⁴ See discussion in Windscheid, §

354, and see as to consideration, *supra*, §§ 505 *et seq.*

⁵ L. 1, § 1, D. h. t.

⁶ See authorities in Windscheid, § 354.

validity of the novation.—“Qui in diem stipulatur, statim novat . . . cum certum sit, diem quandoque venturum”¹—“constat, et stipulatione in diem facta novationem contingere, sed non statim ex ea stipulatione agi posse, antequam dies venerit.”²—Nor is it any objection that the new contract is conditional.³ “At qui sub condicione stipulatur, non statim novat, nisi condicio extiterit.” And by the Roman law, the new agreement, when only vacating the old contract without instituting new obligations, is regarded as simply a release.⁴—Among the most conspicuous cases of novation in our own practice, are those which arise when a debtor selling property agrees with the purchaser and the creditor, that the purchaser is to be taken as debtor in his place. In other words, C., the creditor, agrees to take P., the purchaser of D.’s property, as debtor in place of D., the original debtor.⁵—As falling, also, under the head of novation, may be mentioned the line of cases hereafter discussed,⁶ where negotiable paper with a new name is accepted in satisfaction of an old debt.⁷

¹ L. 8, § 1, D. h. t.

² L. 5, eod.

³ L. 8, § 1.

⁴ Windscheid, § 354.

⁵ *Supra*, § 786 a; *Halsey v. Reed*, 9 Paige, 446; *Barker v. Bucklin*, 2 Denio, 45; *Dingeldein v. R. R.*, 37 N. Y. 575; *Campbell v. Smith*, 71 N. Y. 26; *Calvo v. Davies*, 73 N. Y. 211; *Girard Ins. Co. v. Stewart*, 86 Penn. St. 89; *Merriman v. Moore*, 90 Penn. St. 78; *Johnson v. Knapp*, 36 Iowa, 616; *Beasely v. Webster*, 64 Ill. 458; *Snell v. Ives*, 85 Ill. 279; *Ross v. Kennison*, 38 Iowa, 396; *McDowell v. Laev*, 35 Wis. 171; *Jordan v. White*, 20 Minn. 91; *Shaffer v. McKanna*, 24 Kan. 22; *Mason v. Hall*, 30 Ala. 599; *Meyer v. Lowell*, 44 Mo. 328; *Rogers v. Gosnell*, 58 Mo. 589; and cases cited *Wald’s Pollock*, 220; and other cases cited, *supra*, §§ 786, 786 a. After acceptance of the substitution, it is irrevocable, *Bassett v. Hughes*, 43 Wis. 319. Where the plaintiffs are creditors

of T., and the defendants debtors to T., an agreement by which the defendants assume T.’s debt to the plaintiffs is valid, though this involves the *pro tanto* extinction of T.’s indebtedness. *Wilson v. Coupland*, 5 B. & Ald. 228; *Hodgson v. Anderson*, 3 B. & C. 855; *Fairlie v. Denton*, 8 B. & C. 395; *Cochrane v. Green*, 9 C. B. N. S. 448; *Warren v. Batchelder*, 15 N. H. 129.

⁶ *Infra*, §§ 957.

⁷ *Story*, Prom. Note, §§ 104, 438; *Good v. Cheesman*, 2 B. & Ad. 328; *Wright v. Crockery Co.*, 1 N. H. 281; *Johnson v. Cleaves*, 15 N. H. 332; and see *supra*, § 852. The following may be cited as cases of novation by acceptance of a new security with a new debtor, discharging the old debt. *Price v. Price*, 16 M. & W. 241; *Camidge v. Allenby*, 6 B. & C. 373; *Rogers v. Langford*, 1 C. & M. 637; *Smith v. Mercer*, L. R. 3 Ex. 51; *Jenness v. Lane*, 26 Me. 475; *Babcock v. Hawkins*, 23 Vt. 561; *Brooks v. White*, 2

Where, however, negotiable paper made by other parties is taken in payment of goods, the vendee becomes liable in case such paper, due diligence being shown to pursue it, turns out to be worthless.¹

§ 854. To constitute novation, according to the Roman law, it is essential that there should be shown to be an intention on the part of the creditor to institute a new contractual relation—*animus novandi*. This intention must be proved by the party setting up the novation. But no particular form is requisite for this purpose, nor need it, such is the prevalent opinion, be expressly declared.² In our own law, to constitute the surrender of the old debt and the substitution of another, it must be shown from all the facts that this was the intention of the creditor, and that this intention was duly executed by an agreement with a sufficient consideration.³ It must appear that the creditor intended specifically to accept the new debtor, and agreed so to do.⁴ Thus, in a New Hampshire case, the evidence was that, C. being a creditor of the estate of D., E., D.'s executor, sold a farm belonging to the estate, and left the purchase money in the hands of S., the purchaser, to pay C., and other creditors, which debts S. agreed to pay. It was held that as C. had never assented to this arrangement before suit, or agreed in any way to accept S. as his debtor, the suit could not be maintained.⁵

Consent of the creditor to constitute a new obligation and surrender the old, is essential.

Metc. 283; Markle v. Hatfield, 2 Johns. 455; Whitbeck v. Van Ness, 11 Johns. 409; Boyd v. Hitchcock, 20 Johns. 76; Booth v. Smith, 3 Wend. 66; Frisbie v. Larned, 21 Wend. 450; Christie v. Craige, 20 Penn. St. 430; Gresham v. Morrow, 40 Ga. 487; Jones v. Perkins, 29 Miss. 142.

¹ *Infra*, §§ 954 *et seq.*

² L. 8, § 5, i. f. D. h. t.

³ *Infra*, §§ 953 *et seq.*; Bedford v. Deakin, 2 B. & Al. 210; Robinson v. Read, 9 B. & C. 449; Robson v. Drummond, 2 B. & Ad. 303; Jones v. Walker, 2 Paine, 688; Butterfield v. Hartshorne,

7 N. H. 345. In Conquest's case, L. R. 1 Ch. D. 334, it was held that assent to a novation is not to be inferred unless a definite request has been shown. See Hort's case, L. R. 1 Ch. D. 307; Robson v. Drummond, 2 B. & Ad. 303.

⁴ Smith v. Wheatcroft, L. R. 9 Ch. D. 230; Boulton v. Jones, 2 H. & N. 564; Miller's case, L. R. 3 Ch. D. 391; Boston Ice Co. v. Potter, 123 Mass. 28; Murphy v. Hanrahan, 50 Wis. 489; and see *supra*, § 180.

⁵ Butterfield v. Hartshorne, 7 N. H. 345. See *supra*, §§ 784 *et seq.*

§ 855. It stands to reason that the substitution of a new contract in the place of an old requires the assent of all the parties to the old contract, and of all the parties to the new contract. Unless all the parties to the old contract consent, it cannot be rescinded; unless all the parties to the new contract consent, it cannot be created.¹ We are thus brought to notice the fallacy of the argument on which several American courts rest the conclusion that a third party, with whom no contractual relations have been instituted by the original parties to a contract, can sue on that contract if it contains provisions for his benefit.² A cognate question arises when A. assigns to B. a debt due from C. to A. At what time does such an assignment become irrevocable by A.? The better opinion is, in conformity with what has been stated above, that until A. and C. agree to the transfer of the debt to B., and B. assents to the transfer, the transfer cannot be made. The debtor's assent is necessary to establish the contractual relation with the new creditor.³

And so of
consent of
other par-
ties.

¹ See *Murphy v. Hanrahan*, 50 Wis. 489.

² See *supra*, §§ 785 *et seq.*; *infra*, § 863; *Owen v. Bowen*, 4 C. & P. 43; *Mandeville v. Welsh*, 5 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15.

³ See *supra*, § 840. In *Boulton v. Jones*, 2 H. & N. 564, which has been the subject of much discussion, the defendants sent an order for goods to B., who (they being ignorant of the change) had transferred his business to the plaintiff. The plaintiff, to adopt Mr. Pollock's summary (3d ed. 436), supplied the goods without notifying the change, and after the goods had been accepted, sent an invoice in his own name, whereupon the defendants said they knew nothing of him. It was held that there was no contract, and that he could not recover the price of the goods. The defendants, it should be added, had a set-off against B. Mr. Benjamin, while admitting the ruling of the court to be right under the cir-

cumstances, argues that the defendants were bound "in equity either to make an equitable assignment to the vendor (plaintiff) of his [their] claim against B. for an amount equivalent to the price, or to become trustee for the seller in recovering the claim against B." Mr. Pollock rejects this view, but thinks that a proposal to a particular trader for goods might, in absence of any facts showing personal relationship, be regarded as a proposal to such trader's immediate successors and representatives in carrying on the trade.

As cases of novation see *Tatlock v. Harris*, 3 T. R. 174, and *Wilson v. Coupland*, 5 B. & Ald. 228. That all parties to the old contract must consent to the novation, so as to extinguish the old contract, as well as to establish the new contract, see *Crowfoot v. Gurney*, 9 Bing. 372; *Yates v. Bell*, 3 B. & Ald. 643; *Owen v. Bowen*, 4 C. & P. 93; *Hutchinson v. Heyworth*, 9 Ad. & El. 375; *Walker v. Rostron*, 9

§ 856. According to the Roman authorities, it is immaterial in what points the new contract differs from the old, provided the intention be to extinguish the old contract and create a new contract. The difference may be in the mode of performance,¹ or in the person of debtor or creditor,² or in some merely formal incident.³ The points of change, if not illegal, are indifferent, provided it be clear that the intention of the parties was that the new agreement should take the place of the old agreement.—When a new debtor is introduced on his own motion and not as assignee or appointee of the old debtor, this, according to the modern Roman term is *expromission*. The introduction of a new debtor on the assignment or appointment of the older, is called *delegation*. This, however, it is maintained,⁴ has nothing necessarily in common with novation. That a new debtor is introduced, as where mortgaged property is purchased with an agreement by the purchaser to pay the mortgage, does not necessarily produce a new debt. The new debtor may be bound without any novation, the old debtor may continue to be bound, or be discharged, as the particular agreement provides.—In our law, as an old agreement may be rescinded and a new established in its place without regard to the character of the modification, the same principle holds good.⁵ It is true that the substitution of a new debtor in the place of an old is ordinarily an incident of novation.⁶ But this is not necessarily the case. “A novation,” says Mr. Chitty, adopting Pothier’s definition, “may take place when, without the intervention of any new person, a debtor con-

To novation points of change are immaterial.

M. & W. 411; *Gibson v. Cooke*, 20 Pick. 15; *McKinney v. Alvis*, 14 Ill. 34; *Short v. New Orleans*, 4 La. An. 281. “Whether a note is a renewal of another note . . . depends upon the intention of the parties.” *Irving, J., Flanagan v. Hambleton*, 54 Md. 225, citing *Hacker v. Perkins*, 5 Whart. 95.

¹ L. 28 D. h. t. 8 C. h. t.

² § 3, I. quib. mod. toll. 3, 29; L. 8, § 5, I. 20 D. h. t.

³ *Ibid.*; *Windscheid*, § 353.

⁴ See *Salpius, ut supra*.

⁵ See *Goss v. Nugent*, 2 B. & Ad. 58; *Marshall v. Baker*, 19 Me. 402; *Medomak Bk. v. Curtis*, 24 Me. 36; *Manahan v. Noyes*, 52 N. H. 232; *Russell v. Barry*, 115 Mass. 300; *Murray v. Harway*, 56 N. Y. 337; *Wilson v. Getty*, 57 Penn. St. 266; *Shepler v. Scott*, 85 Penn. St. 329; *Thurston v. Ludwig*, 6 Oh. St. 1; and other cases cited Wh. on Ev. § 1017.

⁶ *Fairlee v. Denton*, 8 B. & C. 395; *Heaton v. Angier*, 7 N. H. 397; *Gill v. Brown*, 12 Johns. 385.

tracts a new engagement with his creditor, in consideration of being liberated from the former,"¹ and he cites cases to this effect where debtors give promissory notes upon the agreement that the creditors should receive the notes in satisfaction and extinction of the debt, and in which the novation consists not in taking a new debtor, but a new security with the old debtor.²—Under delegation, as above stated, fall cases in which on A. owing B., and B. owing C., they make a mutual arrangement by which A. becomes C.'s debtor.³ According to Pothier, as cited by Mr. Chitty,⁴ "delegation is a kind of novation, by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor, or to the person appointed by him. A delegation is made by the concurrence of three parties, and there may be a fourth. It includes a novation, by the extinction of the debt from the person delegating, and the obligation contracted in his stead by the person delegated. Commonly, indeed, there is a double novation, for the party delegated is commonly a debtor of the person delegating; and in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated by the new obligation which he contracts."⁵

§ 857. Whether the new agreement operates as an extinguishment of the old, and hence technically as a novation, is a question to be determined from the entire contract. As will be elsewhere seen, the receipt of a cheque is *prima facie* proof of payment, which is made stronger by the fact that the cheque

Whether old agreement is extinguished depends on construction.

¹ 2 Ch. Cr. L. 11th Am. ed. 1372.

273. As to distinctive New York law, see *infra*, § 954.

² See *infra*, §§ 955–7; Story Prom. Notes, §§ 104, 438; Good v. Cheeseman, 2 B. & Ad. 328; Garrard v. Woolner, 8 Bing. 258; Wright v. Crockery Co., 1 N. H. 281; Johnson v. Cleaver, 15 N. H. 332; Whitcomb v. Williams, 4 Pick. 228; Huse v. Alexander, 2 Met. 157; Darlington v. Gray, 5 Whart. 487; Weakley v. Bell, 9 Watts,

³ 1 Ch. on Con. 11th ed. 1377; Tatlock v. Harris, 3 T. R. 174; Thompson v. Percival, 5 B. & Ad. 925; Cochrane v. Green, 9 C. B. N. S. 448.

⁴ 2 Ch. on Con. 11th ed. 1377.

⁵ Pothier, Cont. pt. 3, c. 2, art. 6, ss. 1, 2.

comes from a third party.¹ Negotiable paper may, by the understanding of the parties, be taken either in satisfaction or as a mere collateral;² the question being one of the construction of the agreement.³ But, as a general rule, the acceptance of immature negotiable paper on account only suspends the debt and operates as conditional payment, and hence as a conditional novation.⁴ When, however, by negligence of the holder, the security is lost, so that there can be no recovery on it, the original debtor is thereby released.⁵—That the old agreement is not necessarily finally extinguished, but may be revived on contingencies provided for in the agreement of substitution, is well settled.⁶ But to novation, in its full sense, the extinguishing of the old agreement is an essential feature. The old agreement is absorbed in the new agreement, and the plaintiff cannot recover on the old agreement which is no longer operative.⁷

§ 858. An agreement for substitution of one debtor for another is void unless it has sufficient consideration.⁸

If C., the creditor, for instance, simply says, "I agree to take S. (the substitute) in place of O. (the original debtor)," this is void;⁹ and so if S. simply says, "I agree to take O.'s place and become debtor to C.," this, without a consideration, does not bind S.¹⁰ But it is not necessary that such a consideration should in any degree be proportional to the interest involved. The adequacy of consideration is a question the courts do not undertake to determine.¹¹ It is enough if the promisor makes the promise on which he is charged as a compensation for some

Must be consideration for agreement of substitution.

¹ *Infra*, § 953.

² *Infra*, §§ 954 *et seq.*

³ *Sayer v. Wagstaff*, 5 Beav. 415; *Maillard v. Argyle*, 6 M. & G. 40; *Bottomley v. Nuttall*, 5 C. B. N. S. 122; see *Van Vranken v. R. R.*, 55 Iowa, 135.

⁴ *Infra*, §§ 954 *et seq.*

⁵ *Infra*, § 958.

⁶ *Infra*, §§ 955 *et seq.*; *Story on Part.* § 254.

⁷ *Cuxon v. Chadley*, 3 B. & C. 591; *Wharton v. Walker*, 4 B. & C. 163;

Heaton v. Angier, 7 N. H. 397; *Hall v. Marston*, 17 Mass. 575; see *supra*, § 728.

⁸ *Cuxon v. Chadley*, 3 B. & C. 591; *Thomas v. Shillibeer*, 1 M. & W. 124; *McKinney v. Alvis*, 14 Ill. 34; see *supra*, § 505.

⁹ See *Butterfield v. Hartshorne*, 7 N. H. 345.

¹⁰ *Ford v. Adams*, 2 Barb. 349.

¹¹ *Supra*, § 853; and see also *supra*, §§ 516-7.

surrender, no matter how slight, by the promisee.¹ Thus if C., the original creditor, says to the substitute, "If you will take his place, I will release D.," the original debtor, this binds C.; and if S., the substitute, says to C., "If you will release D., I will take his place," this is a sufficient consideration so far as concerns S.² The extinction of intermediate original liabilities is in itself a sufficient consideration to sustain the new contract by which the parties to the reconstructed contract become bound to each other in immediate privity.³ C., the creditor, suffers detriment by surrendering D., the original debtor. S. says, "If you will submit to this detriment by letting D. go, I will take his place." This detriment to E. is a sufficient consideration for S.'s promise to C.—An extension of time, also, may be a sufficient consideration for the substitution of a new security. The creditor suffers the detriment of postponement of payment, and in consideration a better secured note is given him.⁴ Thus the surrender of one note and the acceptance of another, even for a smaller amount, coupled with an extension of payment, form a sufficient consideration to sustain the second note.⁵—The agreement between the substituted debtor and the original debtor can be rescinded at any time before the acceptance of the substitution by the original creditor.⁶—A distinction is to be taken between an assignment of a debt to A. and an order on the debtor to pay the debt to A., such order not amounting to an assignment. In the latter case, the debtor is not liable to the holder of the order unless on a promise with sufficient consideration.⁷

§ 859. Although, as has been already seen, the position has been disputed by courts in this country of high authority, the better opinion is that no one who is not a party to a contract can sue on it,⁸ and that no one

Only parties to a contract

¹ *Supra*, §§ 505, 853.

⁴ *Infra*, §§ 996 *et seq.*

² *Supra*, §§ 526 *et seq.*

⁵ *Hixon v. Hetherington*, 57 Ala.

³ 2 Ch. on Cont. 11th Am. ed. 1379; 165.

Bartie v. Moor, 8 Q. B. 489; *Thomas v. Shillibeer*, 1 M. & W. 124; *Phalan v. Stiles*, 11 Vt. 82; *Windham v. Doles*, 59 Ga. 265; *Hixon v. Hetherington*, 57 Ala. 165.

⁶ *Trimble v. Strother*, 25 Oh. St. 378; *Durham v. Bischoff*, 47 Ind. 211.

⁷ *Ford v. Adams*, 2 Barb. 349; see *supra*, §§ 836 *et seq.*

⁸ *Supra*, §§ 784 *et seq.*

can be sued on a contract who is not a party to it.¹ Hence no one, properly speaking, can sue on a novation who is not a party to it. may sue or be sued on it.

§ 860. The acceptance of a higher security from a new debtor in place of the old debt may of itself operate as a merger of the old debt in the new, unless it is understood that the security was intended only as a collateral.² This has been held to be the case where a creditor of a partnership accepts a higher security from a partner in satisfaction of a partnership debt.³ A judgment against one partner, at common law, extinguishes the firm debt;⁴ though in some states it is otherwise by statute. The question, however, is one of intention, and there is no merger unless it was understood by the parties that the new security was in satisfaction of the old debt.⁵ Extinguishment may be by merger.

§ 861. Unless it is required by statute that a contract solemnized in a particular way can only be altered and reconstructed by the same solemnities, parol proof is admissible to show that a particular contract has, before breach, been set aside and another instituted in its place. Even when particular solemnities are required, we have to go back to parol as the foundation of introductory proof. When such solemnities are not required, the proof of substitution may be by parol throughout.⁶ It should, however, to produce the effect of vacating a written contract and establishing a substituted unwritten contract, be strong and clear.⁷ Novation may be proved by parol.

§ 862. A new firm may, with consent of the creditor, adopt the debt of an old firm, and if there be a sufficient consideration, the old debt may be extinguished.⁸ Novation applied to

¹ *Supra*, §§ 809 *et seq.*

² *Supra*, § 684; *infra*, §§ 957, 1040; *Hoskinson v. Elliott*, 62 Penn. St. 393; *Bennet v. Cadwell*, 70 Penn. St. 253.

³ Story on Part. 7th ed. § 155; *Clement v. Brush*, 3 Johns. Cas. 180; *Tom v. Goodrich*, 2 Johns. 213; *Andrews v. Smith*, 9 Wend. 53.

⁴ *Lindley on Part.* 4th ed. 451; *Kendall v. Hamilton*, L. R. 3 Ap. Ca. 403; *Mason v. Eldred*, 6 Wall. 231; and cases cited Story, Part. § 155.

⁵ *Infra*, § 957; *Bottomley v. Nuttall*,

5 C. B. N. S. 122; *Waydell v. Lever*, 3 Denio, 410; *Claffin v. Ostrom*, 54 N. Y. 581; *Leabo v. Goodes*, 67 Mo. 126; *Hill v. Voorhies*, 22 Penn. St. 60; *Potter v. McCoy*, 26 Penn. St. 458.

⁶ See *supra*, §§ 661, 690.

⁷ See Wh. on Ev. § 1017.

⁸ *Weston v. Barton*, 4 Taunt. 673; *Simson v. Ingham*, 2 B. & C. 72; *Hart v. Alexander*, 2 M. & W. 484.

partner-
ship.

—The questions, in cases of alleged novation by acceptance of new partnership debtors, are (1) did the new firm accept the liabilities of the old? and (2) did the creditor, knowing this, consent to the liability of the new firm and discharge the original debtor?¹ Unless these points be settled affirmatively, there is no novation.² By accepting negotiable paper in satisfaction of a debt from one partner, the substitution being intended by the parties, the partnership is discharged.³

§ 863. The mere fact of the continuance of business dealings with a firm after a change in its membership by the creditor of the firm, does not involve a release of the retiring partners. If the creditor should say, "I take as debtor the new firm instead of the old," this would, no doubt, constitute a novation, should it be followed by such an interchange of confidence as would constitute a valid consideration; but to release the old firm as such, there must be proof that something to this effect was said, or that from the facts of the case an intention to release the retiring members could be justly inferred.⁴ The intention of the parties that the new firm should be substituted for the old should be established, if not by express agreement, at least by induction from all the circumstances of the case.⁵

¹ Pollock, 3d ed. 211; Lindley on Part. L. 435; Story on Part. 7th ed. § 155; Rolfe v. Flower, L. R. 1 P. C. 27; S. C., 3 Moore P. C. N. S. 365.

² Gibson *ex parte*, L. R. 4 Ch. 662; Giddings v. Seevers, 24 Md. 363; Armsby v. Farnham, 16 Pick. 318; see Shaw v. Gregory, 105 Mass. 96; Silverman v. Chase, 90 Ill. 37.

³ *Infra*, § 957; Thompson v. Percival, 5 B. & Ad. 925; Kirwan v. Kirwan, 2 Cr. & M. 617; Harris v. Farwell, 15 Beav. 31; Harris v. Lindsay, 4 Wash. C. C. 98; Weldes v. Fessenden, 4 Met. (Mass.) 12; Gandolfo v. Appleton, 40 N. Y. 533.

⁴ Leake, 2d ed. 792; Hart v. Alexander, 2 M. & W. 484; Kirwan v. Kirwan, 2 C. & M. 617; Bilborough v. Holmes, L. R. 5 C. D. 255; Guild v. Belcher, 119 Mass. 257; Torrens v. Campbell, 74 Penn. St. 470; Shamburg v. Ruggles, 83 Penn. St. 148; Wright v. Brosseau, 73 Ill. 381.

⁵ Lindley on Part. 4th ed. 389 *et seq.*; Story on Part. 7th ed. § 153; Babcock v. Stewart, 58 Penn. St. 179; Hountz v. Holthouse, 85 Penn. St. 235; Beall v. Poole, 27 Md. 645; Sternburg v. Callanan, 14 Iowa, 251; see *supra*, § 855.

§ 864. An insurance company may, by the terms of its charter, reserve the right, as against its policy holders, to assign its business to another company; and when this right is reserved it can relieve itself, by making such an assignment, from liability to parties who have insured in it prior to assignment.¹

Insurance company may devolve its duties on assignee.

Whether, when there is no such clause, an assignment by the first insurer is accepted by the insured so as to relieve the former, has been ruled to be a question determinable on all the facts of the concrete case. But the mere payment of premiums to the assignee does not by itself bar the insured from further resort to the assignor.² But novation has been held to be completed by acceptance of a bonus from the assignee company;³ by procuring a specific recognition by the new company of its liability accompanied by payments of premiums to such company;⁴ by exclusive dealings with the assignee company for a long lapse of time;⁵ by application to the assignee company in case of loss as the sole debtor.⁶ But an application for an endorsement of a policy, such endorsement being refused because the applicant would not sign a written consent to the transfer, coupled with taking receipts in the name of the assignee, does not constitute a novation.⁷

§ 865. Novation, being a new contract, based, it is true, upon the extinguishment of a prior contract, but starting an independent obligation dating from its own inception, is not to be regarded as within that provision of the statute of frauds which prescribes a particular form for an agreement to pay another's debt.⁸ If

Novation within statute of frauds.

¹ Leake, 2d ed. 791; Hort's case, L. R. 1 C. D. 307; Grain's case, L. R. 1 C. D. 315; Cocker's case, L. R. 3 C. D. 1; Doman's case, L. R. 3 C. D. 21; Dowse's case, L. R. 3 C. D. 384.

² Conquest's case, L. R. 1 C. D. 334.

³ Times Life Ass. Co., L. R. 5 Ch. 381.

⁴ Blood *ex parte*, L. R. 9 Eq. 316; Miller's case, L. R. 3 C. D. 391.

⁵ Cocker's case, L. R. 3 C. D. 1.

⁶ National Prov. Ass. Soc. *in re*, L. R. 9 Eq. 306.

⁷ Leake, 2d ed. 792; Manchester, etc., Ass. *in re*, L. R. 5 Ch. 640. That the acceptance of payments of an annuity from the assignee of the company granting the annuity is not a novation, see Family Endowment Soc. *in re*, L. R. 5 Ch. 118.

⁸ Bird *v.* Gammon, 3 Bing. N. C. 883; Dearborn *v.* Parks, 5 Greenl. 81; Rowe *v.* Whittier, 21 Me. 545; Pike *v.*

the original debt is discharged, the new promise may be established by parol.¹ But while a novation is not within the statute of frauds in the sense of involving an agreement to pay another's debt, it is as much within the terms of that statute as it would be were there no prior agreement outstanding between the parties. In other words, the fact that a prior agreement has been duly executed in accordance with the statute by the parties, does not in itself validate a new agreement between the parties without the adoption of the formalities the statute prescribes. The intention of the parties, it is true, can be brought out in rectification of the old contract, and this without a new solemnization. But to constitute a new contract there must be a new solemnization in conformity with the statute of frauds.²

Brown, 7 Cush. 133; Barker v. Bucklin, 2 Denio, 45; Farley v. Cleveland, 4 Cow. 432; Rice v. Carter, 11 Ired. 298; Files v. McLeod, 14 Ala. 611; Robbins v. Ayres, 10 Mo. 358; see *supra*, §§ 661, 690.

¹ Wh. on Ev. § 1017, and cases there cited; Goss v. Nugent, 2 B. & Ad. 58;

Bird v. Gammon, 3 Bing. N. C. 883; Medomak Bk. v. Curtis, 24 Me. 36; Wiggin v. Goodwin, 63 Me. 389; Curtis v. Brown, 5 Cush. 492; Watson v. Randall, 20 Wend. 201; Draughan v. Bunting, 9 Ired. 10.

² Wh. on Ev. § 1035; see *supra*, §§ 661, 690.

CHAPTER XXVIII.

MODE OF PERFORMANCE.

I. GENERAL RULES.

Performance must be in accordance with terms of contract, § 869.

By consent mode of performance may be varied, § 870.

[As to conditions, see *supra*, §§ 545 *et seq.*]

[As to part performance of contract of service, see *supra*, §§ 716 *et seq.*: of contract of sale, *infra*, § 899.]

II. PLACE.

Performance to be in assigned place, § 871.

When no place is designated, place of performance is to be inferred, § 872.

On contract to pay money tender must be made personally, § 873.

Form of contract determined by place of solemnization; meaning of words by place of agreement; process by *lex fori*; mode of performance by *lex loci solutionis*, § 874.

Distinctive rule as to negotiable paper, § 875.

Distinctive rule as to insurance, § 875 *a*.

Distinctive rule as to common carriers, § 876.

On contract for sale of goods delivery may be to purchaser's carrier, § 877.

Otherwise as to delivery to captain of ship on bill of lading, § 878.

Vendor must see goods are properly received by carrier, § 879.

Vendor may make carrier his agent, § 880.

III. TIME.

Money obligations without date are payable on demand, § 881.

When no time is fixed for performance a reasonable time is implied, § 882.

So of goods payable on demand, § 882 *a*.

Time in other cases to be inferred, § 883.

When time is fixed, full limit is allowed, § 884.

Last business hour permissible, § 885.

Party by disabling himself or refusing may make himself liable to suit before day fixed, § 885 *a*.

"Forthwith" and similar terms to be construed according to context, § 886.

Time may be of essence, and if so stipulations enforcing it will be compelled, § 887.

Construction of time in equity same as in law, § 888.

Forfeiture may be fixed by agreement, § 889.

Forfeiture from lapse of time cannot be exacted by dilatory party, § 890.

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Time may by notice be made essential, § 892.

Nominal date presumed to be real, § 893.

Date of beginning of lease determined by context, § 894.

When liability continues from one specified day to another, the first is excluded and the last included, § 895.

"Month" in mercantile contracts means "calendar" month, § 896.

When time falls on Sunday, delivery may be on next day, § 897.

IV. QUANTITY OR QUALITY.

Quantity stipulated for must be delivered, § 898.

When duty is divisible, performance may be partial, § 899.

Otherwise when aggregate is contracted for, § 900.

Party preventing completion cannot charge the other with the loss, § 901.

"About," "more or less," are proximate terms, § 902.

Article not answering description may be returned, § 903.

Or vendor may be sued on warranty, § 904.

Article supplied to order is warranted to answer order, § 905.

And so when vendor is specially trusted, § 906.

Otherwise when purchaser buys on his own judgment, § 907.

Vendor may be liable for negligence, § 908.

Express warranty excludes implied, § 909.

Warranty may be implied from usage, § 910.

Warranty does not cover depreciation in transit, § 911.

Provisions sold for domestic use must be fit, § 912.

Conditions imposed by local law must be complied with, § 913.

On sale by sample article must conform to sample, § 914.

Showing sample is not necessarily selling by sample, § 915.

On sale by sample or description purchaser must have opportunity of inspection, § 916.

Average correspondence with sample is enough, § 917.

Warranty may be added to sample, § 918.

V. RESCISSION.

On non-performance of condition precedent, contract may be rescinded, § 919.

I. GENERAL RULES.

§ 869. THE performance of a contract must be in the mode the contract itself specifies.¹ If there is a material failure in this respect, the promisor is liable to the promisee for the breach.² Thus, in an action for a breach of a covenant in a farming lease in selling

Performance must be in accordance with terms of contract.

¹ Leake, 2d ed. 821; Haldane v. Johnson, 8 Exch. 689; Poole v. Tunbridge, 2 M. & W. 223; Higgins v. Emmons, 5 Conn. 756.

² Richardson v. Barnes, 4 Ex. 128; Bailey v. Long, 24 Kan. 90. That substantial conformity is enough, see Glacius v. Black, 50 N. Y. 149, 67 N. Y. 563; Woodward v. Fuller, 80 N. Y. 312; Heekmann v. Pinkney, 81 N. Y.

211; Dauchey v. Drake, 85 N. Y. 407; Preston v. Finney, 2 W. & S. 53; Danville Bridge Co. v. Pomroy, 15 Penn. St. 151; Messner v. Lancaster Co., 23 Penn. St. 291; Stewart v. McQuaide, 48 Penn. St. 191; and see further *supra*, §§ 190, 259, 607. As to construction of contract, see *supra*, §§ 627 *et seq.*

manure and allowing it to be removed, a plea that the tenant had brought back more manure than he carried off was held bad, as introducing a new mode of performance differing from that agreed on.¹—If the delivery be in the way specified, then the creditor cannot recover damages for non-reception, if this arose from his not being present at the time and place designated for the reception.² The failure is imputable to him, and he cannot transfer the loss to the other party.³—The way in which delivery of goods is to be made is sometimes specified in the contract of sale, in which case the delivery is to conform to the directions thus given.⁴ But when there is no such direction, the mode of delivery may be appointed by the purchaser, as whose representative the vendor, in complying with such directions, acts.⁵—The delivery to the purchaser's agent is delivery to the purchaser.⁶ And as we will hereafter see,⁷ delivery to a common carrier, when in accordance with business usage under the circumstances, is also delivery to the purchaser.—The subject of conditional performance is discussed in prior sections;⁸ and so of alternative contracts.⁹

§ 870. Without invalidating a contract, or making its re-execution necessary under the statute of frauds, the mode of performing it may be varied by consent.¹⁰ In such cases, as we have already seen, the old contract remains in force, the application of the contract being regarded as something extrinsic to it, which the parties can subsequently mould without affecting the integrity of the contract as such.¹¹ And this is the case even as to contracts

By consent mode of performance may be varied.

¹ Leigh v. Lillie, 6 H. & N. 165.

² Case v. Green, 5 Watts, 262.

³ Slingerland v. Morse, 8 Johns. 474; Mitchell v. Merrill, 2 Blackf. 87; *supra*, §§ 312, 325, 603, 716.

⁴ Leake, 2d ed. 826; Benj. on Sales, 3d Am. ed. §§ 683 *et seq.*

⁵ Ibid.; Benj. on Sales, § 319; Pearson *ex parte*, L. R. 3 Ch. 443.

⁶ Wing v. Clarke, 24 Me. 373; Hunter v. Wright, 12 Allen, 548.

⁷ *Infra*, § 877.

⁸ *Supra*, §§ 545 *et seq.*

⁹ *Supra*, § 616.

¹⁰ Wh. on Ev. § 1026; *supra*, §§ 661, 690.

¹¹ *Supra*, § 499; Wh. on Ev. § 1026; Leake, 2d ed. 823; Leather Co. v. Hieronymus, L. R. 10 Q. B. 140; Tyers v. Iron Co., L. R. 8 Ex. 315; Plevins v. Downing, L. R. 1 C. P. D. 220; Flagg v. Dryden, 7 Pick. 53; Chester v. Bank of Kingston, 16 N. Y. 336; Agawam Bk. v. Strever, 18 N. Y. 502; Hutchins v. Hebbard, 34 N. Y. 26; Malone v. Dougherty, 79 Penn. St. 46; Bladen v. Wells, 30 Md. 582; Moore v. Davidson, 18 Ala. 209; see Lawrence v. Miller, 86 N. Y. 131.

under statute of frauds, provided there is no substantial alteration of the terms of the contract.¹ Hence, it is competent for the parties to agree to extend the period for performance; and when there is any consideration for this agreement, it is operative.² And a sufficient consideration is found in the mutual promises of the parties based on gain to one party conditioned on detriment to the other.³ "After the agreement has been reduced into writing, it is competent to the parties, at any time before the breach of it, by a new contract not in writing, either to waive, dissolve, or amend the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent terms engrafted upon what will be thus left of the written agreement."⁴ It will be sufficient if the new agreement be made at the time of the breach of the old. Thus in a case in Pennsylvania, in 1880, P. contracted to buy oil of V., on or before a certain date at seller's option. V. tendered the oil, but P. answered that he could not at the moment take and pay for it, and asked for time. V. thereupon, without withdrawing his tender, agreed that P. might have the oil at any time before the expiration of the then ensuing month. It was ruled that the new agreement of the parties was a binding contract for which the mutual promises of postponement formed sufficient consideration, and that P. having within the stipulated time, and at the proper place, offered to take the oil, but having failed to find V. or any one authorized to act for him, V. had broken his contract, and P. was entitled to recover from a stakeholder margins deposited by V. to secure his compliance with the terms of the original contract.⁵

¹ See Wh. on Ev. § 1035.

² *Supra*, § 499.

³ *Supra*, § 505; Robinson v. Bachel-der, 4 N. H. 40; Keating v. Price, 1 Johns. Ca. 22; M'Combs v. M'Kenna, 2 W. & S. 216; Carrier v. Dilworth, 59 Penn. St. 406.

⁴ Goss v. Nugent, 5 B. & Ad. 58.

⁵ McNish v. Reynolds, 10 Weekly Notes, 24. "If," said Trunkey, J., "at the moment for performance of a contract by one party, both agree to a postponement, is the contract broken? A. sells B. a horse for a stipulated price; the horse to be delivered and money paid on a certain day. At the

II. PLACE.

§ 871. When a particular time and place are designated for the performance, the performance must be at that particular time and place.¹ If the place alone is designated, the debtor, in undertaking the performance, must select some reasonable time and notify the creditor accordingly. Should the parties meet at the designated place at any time after the maturity of the obligation, the tender may be in time, provided there is nothing that makes it at that time inconvenient.² If the creditor be notified that the goods are ready for him at the place and time designated by the contract, he cannot recover damages for a breach.³—A common carrier's contract is to deliver the goods received by him at the place to which they are directed. After tender of the goods at that place, his liability as a

Perform-
ance to be
in assigned
place.

appointed time A. tenders the horse. B. says, I am not ready, but if you will wait till to-morrow, I will take the horse and pay you; to which A. agrees. The new contract is as valid as the old. The mutual promises, the one to deliver, and the other to accept and pay, were ample consideration to sustain the new contract. (*Carrier v. Dilworth*, 9 P. F. S. 406.) Can it be that in such case the old was broken, and A. could recover damages for the breach? If his right of action accrued at all, it was at the instant he agreed to a change of time for delivery and payment, instead of demanding strict performance. The parties carried the yet unbroken contract into a new one, and neither has a just claim for damages."

¹ *Savary v. Goe*, 3 Wash. C. C. 140; *Savage Man. Co. v. Armstrong*, 19 Me. 147; *Bates v. Churchill*, 32 Me. 31; *Newton v. Galbraith*, 5 Johns. 119; *Goodwin v. Holbrook*, 4 Wend. 380; *Millard v. Morse*, 32 Penn. St. 506.

Whether delivery at the time and place fixed by the contract is good, though the creditor was not present at the time, see *Robbins v. Luce*, 4 Mass. 874; *Brown v. Berry*, 14 N. H. 459; *contra*, *Smith v. Loomis*, 7 Conn. 110. Where a contract for the sale and delivery of perishable commodities, such as milk, expressly provides that it is to be shipped by the seller to the place of business of the purchaser at the expense of the seller, the place of delivery is the business place of the purchaser, and any loss on the way must fall upon the seller. *Devine v. Edwards*, 101 Ill. 138. As to tender, see *infra*, §§ 989, 990 *et seq.*

² *Infra*, § 990; *Leake*, 2d ed. 851; citing *Shepherd's Touch*. 136; *Co. Lit.* 211 a; *Cocker v. Hemp Co.*, 3 Sumn. 530; *Howard v. Miner*, 20 Me. 325; *Adams v. Adams*, 26 Ala. 272; and see *Savage Man. Co. v. Armstrong*, 19 Me. 147.

³ *Downer v. Sinclair*, 15 Vt. 495; *Phelps v. Hubbard*, 51 Vt. 489.

carrier ceases.¹—The tender is sufficient if at the designated time and place, though the party to receive did not attend.²

§ 872. When no place of performance is designated in a contract, the place of performance is to be inferred from all the circumstances of the case. Where the principal leaves his business in the hands of a general local agent, then such place of business is to be imputed to the principal,³ though it is necessarily otherwise as to travelling agents.⁴ When an obligation is assumed by a party at his domicile, then his domicile is the place of performance, unless the obligation otherwise provides.⁵ *Dating* is not conclusive as to a particular place; and even as to negotiable paper, evidence, so far as concerns accommodation parties, may be received to show that the place at which the document was dated was not meant to be the real place of performance;⁶ though it is otherwise as to parties without notice.⁷ Where the obligation, however, is from the nature of the case to be performed at a particular place, then such place is to be regarded as the place of performance, though not the obligor's domicile.⁸ The debtor's place of business, also, is to be preferred to his domicile, as the place of performance, when from the facts of the case it appears that the performance is to be at the place of business.⁹ When there are no indications of a different intention, goods which it is the custom of business to transfer to the purchaser in the place where they are, are to be delivered at the place at which they were at the time of the contract;¹⁰ and this is eminently the case with articles which are difficult to move, and as to the place of delivery of

¹ Hyde v. Nav. Co., 5 T. R. 389; § 457; Fant v. Miller, 17 Grat. 47; see Shepherd v. R. R., L. R. 3 Ex. 189; *infra*, §§ 881, 899.

Heugh v. R. R., L. R. 5 Ex. 51; and see, generally, Hamilton v. Calhoun, 2 Watts, 130; Ege v. Kauffman, 1 W. & S. 120; Parker v. Jacobs, 14 S. C. 112; *infra*, § 990.

² *Infra*, § 990.

³ Wh. Con. of L. § 405.

⁴ *Ibid.* § 406.

⁵ *Ibid.* § 460. As to tender, see §§ 980, 987, 990 *et seq.*

⁶ Wh. on Ev. § 979; Wh. Con. of L.

⁷ Chapman v. Cottrell, 3 H. & C. 865; Horne v. Rouquette, L. R. 3 Q. B. D. 514; Towne v. Rice, 122 Mass. 67; Vanzant v. Arnold, 31 Ga. 210.

⁸ Cox v. U. S., 6 Pet. 172; Duncan v. U. S., 7 Pet. 435; *infra*, § 990.

⁹ Wh. Con. of L. § 412.

¹⁰ Bronson v. Gleeson, 7 Barb. 472; Lobdell v. Hopkins, 5 Cow. 518; Barr v. Myers, 3 Watts & S. 295.

which no specific directions are given.¹ On the other hand, "if the property is portable, it must be taken to the creditor, and delivered to him or at his residence."² When mingled with other goods, the property sold should be separated for the purposes of tender.³ A place of business, however, where articles of the character in question are usually stored, and from which they are delivered, may be regarded as the place of delivery;⁴ though when goods, such as are usually sent to a customer, are to be delivered to him on a specified day, the delivery must be at his residence,⁵ supposing he appoints no other place for delivery.⁶—When a note is payable in specific articles, and no place of payment is fixed, the maker is to seek out the payee, and deliver to him personally, or if they be too heavy to be readily moved, to apply to him to fix a place of delivery.⁷ When chattles are to be delivered to a party living out of the state, the vendor, if he has no specific directions, and has no prior course of business to guide him, should apply to the purchaser for orders before the goods are forwarded.⁸—The rule that a place, when not designated, is to be inferred, is illustrated by a Pennsylvania case in 1880, where it was held that a sale of carpets by the married lessee of a house, to his unmarried brother residing with him, did not necessarily involve a removal of the carpets.⁹—Where a contract of apprenticeship contains no provision as to the place where it is to be performed by the master, the place is to be inferred from all the circumstances of the case, and is not limited to the place where the master was at the time of the contract.¹⁰

¹ Howard v. Miner, 20 Me. 325; Lobdell v. Hopkins, 5 Cow. 516; Goodwin v. Holbrook, 4 Wend. 377; Barr v. Myers, 3 W. & S. 299; Mingus v. Pritchett, 3 Dev. 78.

² Ross, J., Roberts v. Beatty, 2 P. & W. 71; see Miles v. Roberts, 34 N. H. 254. As to tender, see *infra*, § 992.

³ Ibid.; Goodwin v. Holbrook, 4 Wend. 377.

⁴ Bronson v. Gleeson, 7 Barb. 472.

⁵ Goodwin v. Holbrook, 4 Wend. 377; Bronson v. Gleeson, 7 Barb. 472; Barr

v. Myers, 3 Watts & S. 295; see *infra*, § 982.

⁶ Peck v. Hubbard, 11 Vt. 612; see *infra*, § 990.

⁷ Stewart v. Morrow, 1 Grant (Penn.) 204.

⁸ Bixby v. Whitney, 5 Greenl. 192. As to delivery out of state see *infra*, § 990.

⁹ Evans v. Scott, 89 Penn. St. 136.

¹⁰ Royce v. Charlton, L. R. 8 Q. B. D. 1.

§ 873. Where there is a contract to pay money, the money, on the maturity of the debt, must be tendered to the creditor personally, wherever, such is the English rule, he may happen to be, provided he be in England;¹ and it has been held that, under a composition deed which requires the debtor to give notes to the several creditors in satisfaction of their debts, the tender must be to the creditors personally, although there be no application from the creditors.² And although it has been held that this seeking out the creditor for the purpose of tender is not necessary when the creditor has gone abroad, and the debt is payable in England, yet it is otherwise when the debt is payable abroad at the residence of the foreign creditor. In such case the tender must be made to the foreign creditor at his residence.³—The holder of a note or bill, also, when there is on the paper no designated place of payment, must be sought out wherever he is.⁴—Even where a tenant covenants to pay rent in the manner stipulated in the lease, no place of payment being specified, it is not sufficient for the tenant to be on the premises leased on the designated day with money ready to pay the lessor. The lessor must be personally sought.⁵—A tender may be made by an agent to an agent.⁶

§ 874. As is elsewhere more fully shown,⁷ when there are two or more conflicting local laws bearing upon a contract, the mode of solemnization is to be determined by the law of the place where it is solemnized; the meaning of the words by the law of the place where it was agreed upon, or, in some instances, where the party first using the words was

¹ *Infra*, § 971; Leake, 2d ed. 853, citing Sheppard's Touch. 136; Lit. s. 340; Howard v. Miner, 20 Me. 325; Smith v. Smith, 25 Wend. 405; 2 Hill, 351; and see Eastman v. Rapids, 21 Iowa, 590.

² Cranley v. Hillary, 2 M. & S. 120.

³ Leake, 2d ed. 853; Fessard v. Mugnier, 18 C. B. N. S. 286. That it is not necessary in this country to

seek out a creditor in another state, see Green. Ev. § 611; Allshouse v. Ramsay, 6 Whart. 331; and cases *infra*, § 990.

⁴ Turner v. Hayden, 4 B. & C. 1; Poole v. Tunbridge, 2 M. & W. 225.

⁵ Haldane v. Johnson, 8 Exch. 689; see Rowe v. Young, 2 Brod. & B. 165.

⁶ *Infra*, § 982.

⁷ Wh. Con. of L. § 401.

doing business at the time he used them ; process is to be determined by the law of the place in which the suit is brought ; and the mode of performance by the law of the place of performance. In each case, however, the law of the *forum*, if based on distinctive national policy, or when fixed by peremptory legislation, overrides foreign laws.¹

agreement ;
process by
lex fori ;
mode of
perform-
ance by
*lex loci
solutionis*.

§ 875. In respect to negotiable paper, the limitations of capacity are not ubiquitous ;² formalities are regulated by the *lex loci actus* ;³ the duties of acceptor and maker are determined by the law of the place of payment ;⁴ days of grace, interest, demand, protest, and notice are determinable by the same law ;⁵ and so of defences that go to the merits.⁶ The *lex fori* determines questions of process.⁷ Where a note is payable at a particular time and place, the plaintiff may maintain his action without proving a demand at the time and place designated. Tender, in such cases, is a matter of defence.⁸

Distinctive
rule as to
negotiable
paper.

§ 875 *a*. Insurance policies are ordinarily governed by the law of the principal place of business of the company issuing the policy, though it is otherwise when the insurance is effected by local agents with power to act.⁹ Suits for premium are governed by the law of the place of paying the premium, which, unless otherwise designated, is the domicile of the insured.¹⁰

Distinctive
rule as to
insurance.

§ 876. The interpretation of a bill of lading, so far as concerns its intrinsic qualities, is for the place of the carrier's principal office ; and such, also, is the rule with regard to the construction of contracts limiting the carrier's liability for negligence.¹¹ The law of the place of performance, however, determines the conditions of performance.¹²

Distinctive
rule as to
common
carriers.

¹ Ibid. § 428 ; *supra*, §§ 631, 637.

² Wh. Con. of L. § 447.

³ Ibid. § 448.

⁴ Ibid. §§ 450-3.

⁵ Ibid. §§ 452 *et seq.*

⁶ Ibid. § 462 *a*.

⁷ Ibid. § 462.

⁸ Fleming *v.* Potter, 7 Watts, 380 ; *infra*, §§ 970 *et seq.*

⁹ Wh. Con. of L. § 465 ; *supra*, § 670.

¹⁰ Ibid. § 467.

¹¹ Wh. Con. of L. §§ 471 *et seq.*

¹² Ibid. § 473 *a*.

§ 877. It is not to be expected that a vendor of goods should carry them about until he finds out the purchaser. It is sufficient for him to apply to the purchaser for directions as to the mode of delivery, and placing the goods in this channel will be an adequate delivery.¹ Hence delivery of the goods to a carrier, whether such carrier be expressly designated by the purchaser, or his selection be in accordance with the usual course of business under such circumstances, is delivery to the purchaser.² The property, it is held, on due delivery to the proper carrier, becomes the property of the purchaser, subject only to the vendor's right of stoppage *in transitu*.³ On the other hand, in order to work such transfer of property, it is not necessary that any particular carrier should be selected by the purchaser. It is enough if there be a general order, express or implied, to forward by rail or boat, as the case may be.⁴ It makes, also, no difference which party pays the freight.⁵ But the vendor, in delivering the goods to the carrier, must take such precautions, and guard the transaction with such receipts, as will give the purchaser due proof, if it become necessary for him afterward to sue the purchaser.⁶—The vendor may ex-

¹ *Supra*, §§ 871 *et seq.*; Benj. on Sales, 51 Barb. 451; Magruder v. Gage, 33 3d Am. ed. § 693; Leake, 2d ed. 854; Md. 344; Diversy v. Kellogg, 44 Ill. Leather Cloth Co. v. Hieronymus, L. 114. R. 10 Q. B. 140.

² Wh. Con. of L. §§ 417, 486; Dunlop v. Lambert, 6 Cl. & F. 600; Norman v. Phillips, 14 M. & W. 277; Wait v. Baker, 2 Ex. 1; Dutton v. Solomonson, 3 B. & P. 582; Woolsey v. Bailey, 27 N. H. 217; Garland v. Lane, 46 N. H. 245; Arnold v. Prout, 51 N. H. 587; Strong v. Dodds, 47 Vt. 348; Finch v. Mansfield, 97 Mass. 89; Johnson v. Stoddard, 100 Mass. 306; First Nat. Bk. v. Crocker, 111 Mass. 166; Suit v. Woodhall, 113 Mass. 391; Hall v. Gaylor, 37 Conn. 550; Waldron v. Romaine, 22 N. Y. 368; Rodgers v. Phillips, 40 N. Y. 519; Wilcox Co. v. Green, 72 N. Y. 17; Higgins v. Murray, 73 N. Y. 252; Glen v. Whitaker,

³ Dolan v. Green, 110 Mass. 323; Backman v. Jenks, 55 Barb. 469; Hyde v. Goodnow, 3 N. Y. 266.

⁴ Benj. *ut supra*, § 399, note; Garland v. Lane, 46 N. H. 245; Arnold v. Prout, 51 N. H. 587; Finch v. Mansfield, 97 Mass. 89; Suit v. Woodhall, 113 Mass. 391; Schlesinger v. Stratton, 9 R. I. 578; Mack v. Lee, 13 R. I.; Backman v. Jenks, 55 Barb. 469; Hyde v. Goodnow, 3 N. Y. 266; Watkins v. Paine, 57 Ga. 50.

⁵ *Ibid.*; Dutton v. Solomonson, 3 B. & P. 584; Ranney v. Higby, 5 Wis. 62.

⁶ *Infra*, § 879; Buckman v. Levi, 3 Camp. 414; Alexander v. Gardner, 1 Bing. N. C. 671.

pressly stipulate that the carrier shall act as his agent, and that there shall be no delivery till the goods reach the purchaser's hands.¹ And while a delivery to the purchaser's own ships is a delivery ordinarily to the purchaser, the vendor may, by special agreement, reserve to himself in such cases the *jus disponendi*.² Delivery, however, may be inferred from proof that the vendor acted, in thus shipping the goods, as agent for the purchaser, and did not intend to retain control over the property.³

¹ *Infra*, § 880; *Ibid.*; *Benj. on Sales*, 3d Am. ed. §§ 392, 395, 399; *Wait v. Baker*, 2 Ex. 1; *Turner v. Liverpool Docks*, 6 Ex. 543.

² *Turner v. Liverpool Dock Trustees*, 6 Ex. 543; *Ellershaw v. Magniac*, 6 Ex. 570; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Moakes v. Nicolson*, 19 C. B. N. S. 290; *Schotsmans v. R. R.*, L. R. 2 Ch. Ap. 332.

³ *Benj. on Sales*, *ut supra*; *Van Casteel v. Booker*, 2 Ex. 691; *Brown v. Hare*, 4 H. & N. 822; *Joyce v. Swan*, 17 C. B. N. S. 84; *Moakes v. Nicolson*, 19 C. B. N. S. 290.

In *Bullock v. Stcherge*, U. S. Dist. Ct. Iowa, 16 West. Jur. 354, we have the following from McCrary, J.: "Again, Benjamin, sec. 804: 'A delivery of goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer, through his agent, the carrier, as suffices to put an end to the vendor's lien.' Citing a large number of authorities. See also sec. 675.

"Again, Benjamin, sec. 181, says: 'It is well settled that a delivery of goods to a common carrier, *à fortiori* to one specially designated by the purchaser for a conveyance to him or to a place designated by him, constitutes an *actual receipt* by the purchaser. In such cases the carrier is in contemplation of law the bailee of the person to whom, not by whom, the goods are

sent, the latter in employing the carrier being considered as the agent of the former for that purpose. It must not be forgotten that the carrier only represents the purchaser for the purpose of receiving, not accepting the goods. The law of the United States is the same. *Cross v. O'Donnell*, 44 N. Y. 661; *Caulkins v. Hellman*, 47 N. Y. 449. Citing a large number of English and American cases in note "G." "

"In note 'G' it is said: 'It is not necessary that the purchaser should employ the carrier personally or by some other agent than the vendor. We see no reason why a delivery to a warehouseman should not have the same effect. *Merchant v. Chapman*, 4 Allen, 362; *Hunter v. Wright*, 12 Allen, 548-550. The doctrine in section 181 is repeated with some emphasis in section 693. In *Philips v. Bistolli*, 2 B. & C. 511, the court say: 'To satisfy the statute there must be a delivery of the goods by the vendor with intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of taking to the possession as owner.' *Id.* 142. And in note G: 'A mere delivery is not sufficient; there must further be an acceptance and receipt by the purchaser, else he will not be bound.' Citing *Shepherd v. Pressey*, 32 N. H. 57. Again in the same note:

§ 878. "Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried."¹ It may be considered as settled that the vendor, by making the bill of lading deliverable to his order, may be regarded, until the contrary be shown, as intending to reserve to himself the *jus disponendi*, so that the property does not vest in the purchaser.² And the rule that the property in such cases does not pass to the consignee, holds even though the bill of lading recited that the consignee was to pay no freight, as the goods were "owner's property;"³ and so where the vessel was chartered by the consignee,⁴ or even owned by him.⁵ A delivery of a bill of lading, coupled with endorsement, if payable to order, passes a title to the goods,⁶ though a delivery without endorsement,

Otherwise as to delivery to captain of ship on bill of lading.

"In truth the statute is silent as to the delivery of the goods sold, which is the act of the seller. It requires the acceptance and receipt of some part thereof, which are subsequent acts of the buyer. Foster, J., in Boardman v. Spooner, 13 Allen, 357; Prescott v. Lock, 51 N. H. 94."

"Again, sec. 155: 'In Coombs v. The Bristol and Exeter Railroad Co., 3 H. & N. 510, Pollock, Chief Baron, said, the "vendee should have an opportunity of rejecting the goods. The statute requires not only delivery but acceptance."' 'It may,' says Benjamin, 'be confidently assumed that the construction which attributes distinct meanings to the two expressions "acceptance" and "actual receipt" is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in Smith v. Hudson, 6 B. & S. 431.'"

¹ Benj. on Sales, 3d Am. ed. § 399. "This principle," says Mr. Benjamin, "runs through all the cases, and is clearly enunciated by Parke, B., in

Wait v. Baker, 2 Ex. 1; and by Byles, J., in Moakes v. Nicolson, 19 C. B. N. S. 290." To same effect see Shepherd v. Harrison, L. R. 4 Q. B. 197; L. R. 5 H. L. 116; Gabarron v. Kreeft, L. R. 10 Ex. 274; Newhall v. Vargas, 13 Me. 93.

² Benj. on Sales, 3d Am. ed. § 399; Wilmshurst v. Bowker, 2 M. & G. 792; Ellershaw v. Magniac, 6 Ex. 570; Van Casteel v. Booker, 2 Ex. 691; Jenkyns v. Brown, 14 Q. B. 496; Shepherd v. Harrison, *ut supra*; Merchants' Nat. Bk. v. Bangs, 102 Mass. 298.

³ Turner v. Liverpool Docks, 6 Exch. 543.

⁴ Berndtson v. Strang, L. R. 4 Eq. 481.

⁵ Wait v. Baker, 2 Exch. 1; see to same general effect Stubbs v. Lund, 7 Mass. 457; Rowley v. Bigelow, 12 Pick. 308.

⁶ Lickbarrow v. Mason, 2 T. R. 63; Berkley v. Walling, 7 A. & E. 39; 2 N. & P. 178; Skilling v. Bollman, 73 Mo. 665.

while it may create a lien, does not pass the title as against the creditors of the shipper.¹ And one who receives a bill of lading, even by endorsement, either as collateral security for, or in payment of, prior indebtedness, has no title as a *bona fide* purchaser for value.² The endorsement passes only the title of the endorser.³

§ 879. When the question is one of delivery through a common carrier, the vendor must see that the goods are properly received by the carrier.⁴ Thus where it was notorious at a port of lading that carriers were not responsible for an excess of value of an article lost beyond 5*l.*, unless notified of the value, and paid specially, it was held by Lord Ellenborough that a vendor who neglected to give the proper notice of value to the carrier was responsible for the loss to the purchaser.⁵

Vendor must see goods are properly received by carrier.

§ 880. A vendor, by undertaking to deliver at a distant point, may make the carrier his agent, in which case the vendor assumes the risk of the carriage.⁶ And this holds good even when the promise by the vendor to deliver at the purchaser's place of business is made after the original contract of sale, and when there is no usage as to mode of delivery.⁷

Vendor may make carrier his agent.

III. TIME.

§ 881. A bill or note, not designating any time for payment, is payable on demand, but interest does not begin to run, unless expressly provided by the instrument, until demand is made.⁸ On the other hand, it is held that interest on a money bond not specifying

Money obligations without date are payable on demand.

¹ *Stone v. Swift*, 4 Pick. 389; *Bissell v. Steel*, 67 Penn. St. 443; *supra*, § 793.

² *Lesassur v. The Southwestern*, 2 Woods, 35; *Naylor v. Dennie*, 8 Pick. 199; *Harris v. Pratt*, 17 N. Y. 249; *O'Brien v. Norris*, 16 Md. 122; *Loeb v. Peters*, 63 Ala. 243; *Skilling v. Bollman*, 73 Mo. 665.

³ *Empire Trans. Co. v. Steele*, 70 Penn. St. 188.

⁴ *Benj. on Sales*, 3d Am. ed. § 694;

Buckman v. Levi, 3 Camp. 414; *Cothay v. Tute*, 3 Camp. 129; *Alexander v. Gardner*, 1 Bing. N. C. 671.

⁵ *Clarke v. Hutchins*, 14 East, 475.

⁶ *Dunlop v. Lambert*, 6 Cl. & F. 600.

⁷ *Taylor v. Cole*, 111 Mass. 363; *Hanauer v. Bartels*, 2 Col. 514; cited *Benj. on Sales*, 3d Am. ed. § 694; *Turner v. Liverpool Docks*, 6 Ex. 543.

⁸ *Leake*, 2d ed. 836; *Whitlock v.*

Underwood, 2 B. & C. 157; *Brown in*

any day for payment, runs from the date of the bond, which is regarded as an obligation for the payment of money on that day.¹—As will be hereafter seen, prior demand is not ordinarily necessary to constitute indebtedness;² though it may be necessary in contracts of bailment or sale.³ Bonds, also, conditioned for payment on demand require demand.⁴

§ 882. When no time for the performance of a contract is fixed, it will be held that the performance must be at a reasonable time, taking all the circumstances of the case in consideration.⁵ Thus when no time is fixed for the delivery of goods sold, the character of the goods, their locality, and the locality of the parties, are to be taken into consideration.⁶ The fact that payment is not to be made till a definite period after sale does not by itself defer the delivery till then,⁷ though evidence has been admitted under such a contract to the effect that delivery and payment were to be simultaneous.⁸ And an agreement for the sale of goods “to be delivered and paid for in fourteen days,” means that payment and delivery were to be concurrent acts within the fourteen days.⁹—A carrier is bound

re, 2 Story, 503; *Salter v. Burt*, 20 Wend. 205; see fully, *supra*, § 575. In *Wood v. Cool*, 4 Met. 203, Shaw, C. J., stated the law to be in the United States, “In the absence of all proof of particular contract or special custom three days of grace are allowed on bills of exchange and promissory notes; and when it is relied upon that by special custom no grace is allowed, or any other term of grace than three days, it is an exception to the general rule, and the proof lies on the party taking it.” But this does not apply to paper payable on demand, as has been just seen, nor to cheques on banks. *Bowen v. Newell*, 5 Sandf. 326.

¹ *Farquhar v. Morris*, 7 T. R. 124; see *supra*, § 577.

² *Supra*, § 575.

³ *Supra*, § 576.

⁴ *Supra*, § 577.

⁵ *Benj. on Sales*, 3d Am. ed. §§ 685, 695, 701; *Startup v. MacDonald*, 6 M. & G. 611; *Ford v. Cotesworth*, L. R. 4 Q. B. 133; *Jones v. Gibbons*, 8 Exch. 920; *Cocker v. Hemp Co.*, 3 Sumner, 530; *Atwood v. Clark*, 2 Greenl. 249; *Atkinson v. Brown*, 20 Me. 67; *Bailey v. Simonds*, 6 N. H. 159; *Russell v. Ormsbee*, 10 Vt. 274; *Atwood v. Cobb*, 16 Pick. 227; *Wheelock v. Tanner*, 39 N. Y. 481; *Adams v. Adams*, 26 Ala. 272.

⁶ *Ellis v. Thompson*, 3 M. & W. 446; *Cocker v. Hemp Co.*, 3 Sumner, 530; *Davis v. Tallcot*, 2 Kern. 184; see *Atwood v. Clark*, 2 Greenl. 249; *Hill v. Hobart*, 16 Me. 164.

⁷ See *Spartali v. Benecke*, 10 C. B. 212.

⁸ *Field v. Lelean*, 6 H. & N. 617; *Wh. on Ev.* §§ 929, 969.

⁹ *Godts v. Rose*, 17 C. B. 229.

to deliver within reasonable time, taking all the circumstances of transportation into consideration.¹ The test of reasonableness, when no time is fixed in the contract, has been also applied to the discharge of the cargo of a ship;² to the providing a cargo under a charter party,³ and to the ejection of a tenant at will.⁴—A contract to marry, also, without fixing the date, is a contract to marry within a reasonable time.⁵—Where a debt is payable in stocks, but no time of delivery is fixed, they should be tendered at once, and if any loss occur through unreasonable delay, this loss is to fall upon the party causing the delay.⁶ Reasonableness, in this relation, has been said to be a question of law.⁷ But when the question depends on the varying circumstances of concrete cases, it is much more a question of business duty than one of law. The law stops with announcing the general rule that the time for performance must be “reasonable.” But what is “reasonable” depends in part on the nature of the goods, in part on the usage of the parties, in part on the conveniences of transportation, in part on the demands of the market, conditions presenting themselves in new aspects in each case, and requiring the question in each case to be settled inductively

¹ *Hales v. R. R.*, 4 B. & S. 66; *Taylor v. R. R.*, L. R. 1 C. P. 385. As to meaning of term “reasonable,” see *Atwood v. Emery*, 1 C. B. N. S. 110; *Toms v. Wilson*, 4 B. & S. 442; *Bass v. White*, 65 N. Y. 565.

² *Ford v. Cotesworth*, L. R. 4 Q. B. 127; and see *Thiis v. Byers*, L. R. 1 Q. B. D. 249.

³ *Adams v. Mail Co.*, 5 C. B. N. S. 492. For the above citations see *Leake*, 2d ed. 837.

⁴ *Ellis v. Paige*, 1 Pick. 43.

⁵ *Leake*, 2d ed. 838; 2 Pars. on Cont. 64; 3 Add. on Cont. 447; *Cherry v. Thompson*, L. R. 7 Q. B. 574; *Caines v. Smith*, 15 M. & W. 189; *Nunan v. Bourquin*, 7 Phil. 239; *Wag-enseller v. Simmers*, 97 Penn. St. 465. In this case *Mercur, J.*, said: “A contract to marry without specification of

a time is a contract to marry within a reasonable time. Each party has a right to a reasonable delay; but not to delay without reason or beyond reason. The age of the parties and the pecuniary ability of the man to support a family, are proper matters to consider in the reasonableness of the delay in a particular case.” That a person disabling himself from marrying cannot on this ground defend himself on a suit for damages, see *supra*, § 324; *infra*, § 885a; and that in such case no demand is necessary, see *supra*, §§ 575, 606.

⁶ *Demarest v. McKee*, 2 Grant (Penn.) 248.

⁷ 2 Pars. on Cont. 661, citing *Stodden v. Harvey*, Cro. Jac. 204; *Atwood v. Clark*, 2 Greenl. 249; *Porter v. Blood*, 5 Pick. 54; *Murray v. Smith*, 1 Hawks. 41.

from all the facts.¹—Parol evidence is admissible of the facts and circumstances attending the sale in order to determine what is a reasonable time;² but not to show that a specific day was intended when this contradicts the contract, unless mutual mistake be shown.³

§ 882 *a*. We have already seen⁴ that demand may be a condition of contracts of bailment or sale. We have now to observe that when goods are to be delivered on demand, the demand must be at the time and place designated, and, where there is no designation, at a reasonable time and place.⁵ The demand may be made on the debtor's agent in the debtor's absence.⁶ And the demand, so far as its contents are concerned, must be reasonable, and must conform to the contract.⁷

§ 883. When a place is fixed for the performance of a contract, but no specific time is designated, then the promisor must notify the promisee when he proposes to attend at the specified place for the purpose of performance. When the day as well as the place is designated, "the law appoints the last convenient time of the day for both to attend for the purpose, and the promisor may protect himself from default by being then present at the place, prepared to pay or perform his contract; but it is also sufficient for him to tender the payment or performance at the place, if the promisee should happen to be there, at any time upon the day appointed."⁸ But when the contract provides for the payment, at a designated place, of certain articles

¹ See *Taylor v. R. R.*, L. R. 1 C. P. 385; *Ellis v. Thompson*, 3 M. & W. 445; *Howe v. Huntingdon*, 15 Me. 350; *Green v. Dingley*, 24 Me. 131; *Cameron v. Wells*, 30 Vt. 633; *Roberts v. Beatty*, 2 Pen. & W. 63; *Murray v. Smith*, 1 Hawks. 41; *Boyd v. Gunnison*, 14 W. Va. 1; *Philips v. Morrison*, 3 Bibb, 105.

² *Ellis v. Thompson*, 3 M. & W. 445; *Jones v. Gibbins*, 8 Ex. 920; *Cocker v. Hemp Co.*, 3 Sumn. 530; *Coates v. Sangston*, 5 Md. 121.

³ *Cocker v. Hemp Co.*, 3 Sumn. 530; *Atwood v. Cobb*, 16 Pick. 227.

⁴ *Supra*, §§ 575 *et seq.*

⁵ 2 Ch. on Cont. 11th Am. ed. 1206; *Dunn v. Marston*, 34 Me. 382; *Higgins v. Emmons*, 5 Conn. 76; *Rice v. Churchill*, 2 Denio, 145.

⁶ *Mason v. Briggs*, 16 Mass. 453; *Rice v. Churchill*, 2 Denio, 145; *infra*, §§ 982 *et seq.*

⁷ *Vance v. Bloomer*, 20 Wend. 196.

⁸ *Leake*, 2d ed. 835; citing *Co. Lit.* 202 *a*, 211 *a*; *Wade's case*, 5 Co. 114 *a*; *Myers v. De Mier*, 52 N. Y. 647.

to be chosen by the promisee, but no time is fixed for payment in the contract, the payment is to be on demand.¹

§ 884. The full limit of time specified for performance is allowed to the party from whom the performance is due.² Thus the acceptor of a bill of exchange has the whole day on which the bill becomes due to make payment; and though it may be presented for payment at any time during business hours of that day, and if refused, may be treated as dishonored, and notice given accordingly, yet if payment be tendered at any time during the day, the dishonor and notice will be avoided.³ And where a party has a month in which to perform a contract, suit cannot be brought against him for non-performance until that month is expired.⁴ And a contract to deliver coal within the last fourteen days of March, is satisfied by a tender on the last business hour on the thirty-first of March.⁵—A contract to deliver oil, “buyer’s option, at any time from this to December 31st,” gives the seller the whole of December 31st for performance.⁶

When time is fixed for performance, full limit allowed.

§ 885. When goods are to be delivered within a certain period, the vendor may deliver on the last day of that period, at the latest business hour, though the purchaser will not be obliged to attend at his store at an unreasonable hour for the purpose of receiving the goods.⁷ —As a general rule, the performance of a business contract

Last business hour permissible

¹ Russell v. Ormsbee, 10 Vt. 274.

² See *infra*, § 895.

³ Leake, 2d ed. 834; Leftley v. Mills, 4 T. R. 170; Burbridge v. Mannors, 3 Camp. 193.

⁴ Harris v. Blen, 16 Me. 175; see Oatman v. Walker, 33 Me. 67; Erskine v. Erskine, 13 N. H. 436; as to meaning of month, see *infra*, § 896.

⁵ Startup v. MacDonald, 6 M. & G. 593; see *infra*, § 895.

⁶ Conawingo Co. v. Cunningham, 75 Penn. St. 138; Cleveland v. Sterrett, 70 Penn. St. 204.

⁷ *Infra*, § 980; Startup v. McDonald,

6 M. & G. 593. See Leigh v. Paterson, 8 Taunt. 540, in which it was held that where the delivery was to be in “all December,” the vendor had the whole month in which to deliver, and that the damages on non-delivery were to be assessed at the value of the goods on the last day of the month. In Sweet v. Harding, 19 Vt. 587, a separation of grain payable “in January,” was held too late when made in the evening of the last day of January, though in the place designated, the purchaser not being notified.

may be delayed to the last business hour of the day;¹ that of a personal service at any hour before midnight.²

¹ *Savary v. Goe*, 3 Wash. C. C. 140; *Aldrich v. Albee*, 1 Greenl. 120; *Tierman v. Napier*, 5 Yerg. 410. See *infra*, § 980.

² *Thomas v. Hayden*, cited 19 Vt. 589; but see *Sweet v. Harding*, 19 Vt. 587.

In *Startup v. Macdonald*, 6 M. & G. 625, Parke, B., said: "Where a thing is to be done *anywhere*, a tender at a convenient time before midnight is sufficient; where the tender is to be done *in a particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset."

In *Croninger v. Crocker*, 62 N. Y. 151, the agreement was to furnish hogs to be delivered "the first half of August, 1871, to be weighed at G.'s scales near B. It was held that the delivery was to be at the scales, and might be deferred until the 16th of August, down to the noon of which day the hogs should be kept at the scales; and that it was not enough for the hogs to be at the scales a part of the forenoon of that day."

In *Bass v. White*, 65 N. Y. 565, the price of a load of coal was to be paid on receipt of a bill of lading, which was presented in New York on Saturday, five minutes before three o'clock. Some discussion arose as to a set-off, by which the parties were detained until after three o'clock. The plaintiffs then offered a cheque for the purchase-money, which the defendants declined to take, on the ground that it was too late for banking hours. It was held that the plaintiffs' tender on the succeeding Monday morning was in time.

And see *infra*, § 980.

That fractions of a day will be recog-

nized in cases where this is required by substantial justice was ruled by the supreme court of the United States in 1882, in *Louisville v. Savings Bank*, 13 Rep. 193; and it was consequently held that the second section of article fourteen of the Illinois constitution, prohibiting railroad donations by municipalities, which went into operation on July 2, 1870, did not invalidate municipal bonds issued on behalf of a railroad corporation, pursuant to an election held on that day at an hour prior to the closing of the polls of the general election at which the people of the state voted on the adoption of the constitution; the bonds, so issued, to be applied in discharge of a donation voted in 1868 to be paid by special tax. In the opinion of the court, Harlan, J., adopted the following from Lawrence, J., in *Grosvenor v. Magill*, 37 Ill. 240: "It is true that for many purposes the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time. 2 Blackst. Com. 140, notes. The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month, which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules." "The views expressed in the last case," continues Harlan, J., "are consistent with sound reason and public policy. They accord with our own judgment, and are in line with the

§ 885 a. A promisor, by absolutely putting it out of his power to fulfil a contract entered into by him, may make himself liable, without demand, from the time he thus incapacitates himself, even though the time for performance has not yet arrived.¹ He may, for instance, expressly repudiate the contract, in which case he may be at once sued,² though the other party, if electing to sue immediately for the repudiation, cannot afterwards insist on the performance.³ A party, also, disabling himself by selling to B. an estate he has agreed to convey next month to A., may be sued at once by A.⁴ And a party disabling himself from marriage to A. (to whom he is engaged), by marrying B., may be sued by A. without prior demand.⁵ It has also been held that on a contract to sell to the plaintiff all the starch manufactured by the defendant within a year, an action will lie immediately on a breach, without waiting for the expiration of a year.⁶—As will be hereafter seen, the delivery of goods may be conditioned on the supply of material by the other party,⁷ and so of a covenant to repair.⁸—“It may also be observed,” to adopt the words of a learned federal judge in 1882, “that in contracts for services, for marriage, for deliveries of merchandise, if the principal, before the time for performance arrives, renounces

Party by disabling himself or refusing may make himself liable to suit before day fixed.

settled course of decisions in other courts. *Arnold v. United States*, 9 Cranch, 119; *Richardson's case*, 2 Story, 571; *Lapeyre v. United States*, 17 Wall. 198; *United States v. Norton*, 97 U. S. 170; *Burgess v. Salmon*, ib. 381; *Kennedy v. Palmer*, 6 Gray, 316; *People v. Clark*, 1 Cal. 406; *Roe dem. Wrangham v. Hersey*, 3 Wils. 274; *Combe v. Pitt*, 3 Burr. 1423, 1434.”

¹ See 2 Ch. on Cont. 11th Am. ed. 1067, where this topic is fully discussed; and see *Johnston v. Caulkins*, 1 John. Cas. 116, and cases cited *supra*, §§ 312, 663, 716, on analogous questions. See, also, as sustaining the text, *Lovelock v. Franklyn*, 8 Q. B. 371; and see *New England Ins. Co. v.*

Butler, 34 Me. 451; *Hammett v. Brown*, 60 Ala. 498; *Wolf v. Marsh*, 54 Cal. 228.

² *Hochster v. De la Tour*, 2 E. & B. 678; *Avery v. Bowden*, 5 E. & B. 714; *Wilkinson v. Verity*, L. R. 6 C. P. 206.

³ *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 5 E. & B. 729; *supra*, § 290.

⁴ 1 Ch. on Cont. 11th Am. ed. 1067; citing 1 Roll. Abr. 248; *Co. Litt.* 220 b; *Ford v. Tiley*, 6 B. & C. 325; *Trask v. Vinton*, 20 Pick. 111; *Heard v. Bowers*, 23 Pick. 455.

⁵ *Supra*, §§ 575, 606.

⁶ *Hubbert v. Borden*, 6 Whart. 79.

⁷ *Supra*, § 585.

⁸ *Supra*, § 586.

the contract, an immediate action will lie."¹ This rule, however, is not applicable to commercial paper, whose maturity cannot in this way be anticipated.²

§ 886. Terms settling time are to be construed according to context. "Forthwith," when used independently, means such promptness as under the circumstances is reasonable.³ On the other hand, where it was provided that bonds should be given mutually within ten days for securing the contract, and the performance was to be "forthwith," it was held that "forthwith" did not mean "immediately," but that the giving of the bonds was a condition precedent to the performance.⁴ But the delivery of the goods is a condition precedent to payment in a contract which provides that the goods are to be delivered "forthwith," the price to be paid within fourteen days from the date of the contract.⁵—Where a manufacturer agrees to deliver goods "as soon as possible" to the purchaser, this was ruled to mean as soon as this could be done in view of the fact that the goods had to be manufactured, and that delivery was to be according to priority. And where a written order by a cooper for iron hoops was sent to the manufacturer on the 30th of November, it was held that it was complied with by a tender in the following February.⁶—"Directly," when used by itself, and not as indicating de-

¹ Lowell, J., *Dingley v. Oler*, 11 Fed. Rep. 373, citing *Hochster v. De la Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Howard v. Daley*, 61 N. Y. 362; *Fox v. Kitton*, 19 Ill. 519; *Holloway v. Griffith*, 32 Iowa, 409. See, however, as exhibiting exceptions to rule, opinion of Judge Wells in *Daniels v. Newton*, 114 Mass. 530.—It does not follow, however, because a party has renounced a contract, thereby enabling suit to be brought on it before its maturity, that damages are to be adjusted to the time of renouncing. If a vendor, for instance, had an option of delivery later, and the price falls at the time of the option, the price at such date is all that the vendee can recover on a suit

for damages for non-performance. *Dingley v. Oler*, *supra*.

² *Ibid*.

³ Leake, 2d ed. 839, citing *Sullivan ex parte*, 36 L. J. B. 1; *Hudson v. Hill*, 43 L. J. C. P. 273.

⁴ *Roberts v. Brett*, 11 H. L. Cas. 337.

⁵ *Staunton v. Wood*, 16 Q. B. 638; see *Benj. on Sales*, 3d Am. ed. § 687; *Isaacs v. Plaster Works*, 67 N. Y. 124. As to when payment is conditioned on delivery, see *supra*, §§ 575 *et seq*.

⁶ *Atwood v. Emery*, 1 C. B. N. S. 110; see *Hydraulic Engineer Co. v. McHaffie*, L. R. 4 Q. B. D. 670; *De Oleaga v. West Cumb. Iron Co.*, L. R. 4 Q. B. D. 472.

pendence on another event, requires immediate despatch.¹ But the strongest terms calling for promptitude will be construed to involve the condition of reasonableness, unless the emergency be such as to make any delay hazardous.² Even where a bill of sale provided that the payment should be "instantly on demand, and without delay on any pretence whatsoever," this was held not to require a suspension of all other duties so as to hurry off a payment, the debtor, in case of absence, being entitled to reasonable time to receive notice and respond.³

§ 887. Cases, however, frequently occur in which it is essential to the fair carrying out of a contract that certain stipulations as to time should be observed.⁴ Thus, when it is provided that objections to title must be submitted within a specified period after the delivery of the abstract, a party cannot hold back his objections, and then spring them after the time allotted;⁵ though the vendor may waive this stipulation by laches on his part, or by receiving objections after the designated period.⁶ There may also be circumstances attending an engagement to deliver possession on a certain day, which may make it essential and make a breach in this respect fatal in equity as well as in law;⁷ as where there is material fluctuation in prices, and prompt action is necessary to enable the bargain to be duly carried out.⁸ When, also, a punctual de-

Time may be of essence, and if so, stipulations enforcing it will be compelled.

¹ *Duncan v. Topham*, 8 C. B. 225.

² *Leake*, 2d ed. 840, citing *Atwood v. Emery*, 1 C. B. N. S. 110; *Brighty v. Norton*, 3 B. & S. 305; *Toms v. Wilson*, 4 B. & S. 455; *Jackson v. Ins. Co.*, L. R. 10 C. P. 125.

³ *Massey v. Sladen*, L. R. 4 Ex. 13; *Trevor ex parte*, L. R. 1 C. D. 297. See *Benj. on Sales*, 3d Am. ed. § 709.

⁴ *Supra*, § 203; *Benj. on Sales*, 3d Am. ed. § 593; 1 *Sug. V. & P.* (8th Am. ed.) 411; *Bispham's Eq.* (2d ed.) § 392; *Patrick v. Milner*, 2 C. P. D. 342; *Brashier v. Gratz*, 6 *Wheat.* 533; *Snowman v. Harford*, 55 *Me.* 197; *Goldsmith v. Guild*, 10 *Allen*, 239; *Wells*

v. Smith, 7 *Paige*, 22; *Dominick v. Michael*, 4 *Sandf.* 426; *Griggs v. Landis*, 21 *N. J. Eq.* 494; *Bellas v. Hays*, 5 *S. & R.* 427.

⁵ *Leake*, 2d ed. 348; *Oakden v. Pike*, 34 *L. J. C.* 620; see generally *Taylor v. Longworth*, 14 *Pet.* 172; *Scott v. Fields*, 7 *Ohio*, pt. ii. 90; *Scarlett v. Stein*, 40 *Md.* 512.

⁶ *Upperton v. Nickolson*, L. R. 6 *Ch.* 436; *Want v. Stallibrass*, L. R. 8 *Ex.* 175; *Cutts v. Thoday*, 13 *Sim.* 206.

⁷ See *Boehm v. Wood*, 1 *J. & W.* 419; *Goldsmith v. Guild*, 10 *Allen*, 239.

⁸ *Claydon v. Green*, L. R. 3 *C. P.* 511; *Richmond v. Gray*, 3 *Allen*, 30.

livery of property sold is essential to its utilization by the purchaser, the vendor, by delay in delivery, may lose his right to enforce his bargain.¹ Such, also, is the case with the sale of a residence, possession to be delivered on a particular day, and the purchaser waiting to come in;² with the sale of a public house, when it is stipulated that the license is to be transferred simultaneously with possession, and the license is essential to the working of the house;³ with business engagements, whose success necessarily depends on promptitude;⁴ with sales of leaseholds and mining property, whose value time necessarily depreciates;⁵ with sales of annuities;⁶ with sales of leases for lives;⁷ with sales of land as business security;⁸ with sales of reversionary interests;⁹ and with sales of stocks which are subject to market fluctuations.¹⁰ And in all cases where by contract an option is reserved to a party to accept a thing at a particular time, time is of the essence of the contract, as otherwise the vendor would be the trustee of the purchaser.¹¹

§ 888. The construction given in equity to stipulations as to time is the same as that given in law. When time is an essential element in a contract, the same rules that would be applied to its determination in law will be applied in equity.¹² Thus, in a case in

Construc-
tion of
time in
equity
same as in
law.

¹ *Wright v. Howard*, 1 Sim. & S. 190; *Nokes v. Kilmory*, 1 D. & Sm. 444; *McKay v. Carrington*, 1 McLean, 50.

² *Tilly v. Thomas*, L. R. 3 Ch. 61; *Webb v. Hughes*, L. R. 10 Eq. 281.

³ *Leake*, 2d ed. 849; *Coslake v. Till*, 1 Russ. 376; *Day v. Luhke*, L. R. 5 Eq. 336; *Cowles v. Gales*, L. R. 7 Ch. 12; *Claydon v. Green*, L. R. 3 C. P. 511.

⁴ *Brashier v. Gratz*, 6 Wheat. 528; *Becker v. Smith*, 59 Penn. St. 469; *Benninger v. Hankee*, 61 Penn. St. 343; *Parshall's App.*, 65 Penn. St. 224; *Cleveland v. Sterrett*, 70 Penn. St. 204; *Hewson v. Paxson*, Sup. Ct. Penn. 1881; *Stow v. Russell*, 36 Ill. 18.

⁵ *Mackbryde v. Weekes*, 22 Beav. 533; *Hudson v. Temple*, 29 Beav. 536.

⁶ *Withy v. Cottle*, T. & R. 78.

⁷ *Wheeler v. D'Esterre*, 2 Dow. 359; see *Noonan v. Orton*, 21 Wis. 283.

⁸ *McKay v. Carrington*, 1 McL. 59.

⁹ *Newman v. Rogers*, 4 Bro. C. C. 391.

¹⁰ *Leake*, 2d ed. 849; *Doloret v. Rothschild*, 1 Sim. & S. 590; *Campbell v. R. R.*, 5 Hare, 519.

¹¹ *Ranelagh v. Melton*, 2 Dr. & S. 278; see *supra*, § 203; *Banks v. Haskie*, 45 Md. 209; *Prestman v. Silljacks*, 14 Rep. 331.

¹² *Lloyd v. Collett*, 4 Br. C. C. 469; *Roberts v. Berry*, 3 D. M. & G. 284; *Tilley v. Thomas*, L. R. 3 Ch. 67; *Hepburn v. Auld*, 5 Cranch, 262; *Brashier v. Gratz*, 6 Wheat. 528; *Taylor v. Longworth*, 14 Pet. 172; *Eastman v. Plumer*, 46 N. H. 464; *Wiswall v. McGown*, 2 Barb. 270; *Merritt v.*

Pennsylvania in 1881, the plaintiff sued on the following instrument: "In settlement of the claim of Hon. E. M. P., executor . . . against me for \$2282.50, and interest from Jan. 15, 1875, I hereby agree to pay to said executor the sum of \$1000 and interest from said Jan. 15, 1875, within twenty days from this date. It being distinctly understood that if I do not pay said \$1000 and interest punctually, as above stated, the whole demand of \$2282.50 and interest shall be paid . . . A. H. Phila. Oct. 21, 1879." It was held that on a failure to pay the sum of \$1000 at the time designated, the whole demand became due.¹—"The construction is and must be in equity the same as in a court of law. A court of equity will, indeed, relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion or for steps towards completion, if it can do justice between the parties. This is what is meant when it is said that in equity time is not of the essence of the contract."² On the other hand, a court of equity will not refuse specific performance because of some technical want of punctuality in the complainant in performing a condition precedent.³ Hence, in contracts for the conveyance of

Brown, 6 C. E. Green, 401; King v. Ruckman, 6 C. E. Green, 599.

¹ *Mercur, J.*, in delivering the opinion of the court, said: "In the agreement of October 21, 1879, there is a distinct admission of a settlement in which there was found due from the plaintiff in error a sum specified, with an implied agreement of the executor to accept a smaller sum in satisfaction of the larger in case the smaller should be paid at a day specified, time being made the essence of the agreement. Time is not generally of the essence of a contract, but may be made so by express agreement or plainly indicated by the attending circumstances. *D'Arras v. Keyser*, 2 Casey, 249; *Shaw v. Turnpike Co.*, 2 P. & W. 454. Where time is made of the essence of

a contract, equity will not grant relief against an omission to pay or perform on the day. *Shaw v. Turnpike Co.*, *supra*; *Patchin v. Lamborn*, 7 Casey, 314; *Chew v. Phillippi*, 8 ib. 205; *Waters v. Waters*, ib. 307; *Becker v. Smith*, 9 P. F. S. 469; *Reed v. Breeden*, 11 ib. 460; *Parshall's Appeal*, 15 ib. 224." *Hewson v. Paxon*, 12 Rep. 313.

² *Cairns, L. J.*, *Tilley v. Thomas*, L. R. 3 Ch. 67; *Bisph. Eq.* 2d ed. § 391; see *Barnard v. Lee*, 97 Mass. 92; *Dresel v. Jordan*, 104 Mass. 415; *King v. Ruckman*, 5 C. E. Green, 316; *Brock v. Hidy*, 13 Oh. St. 306; *Jackson v. Ligon*, 3 Leigh, 161.

³ See *supra*, §§ 607, 869; *Leake*, 2d ed. 846; *Roberts v. Berry*, 3 D. M. & G. 284; *Webb v. Hughes*, L. R. 10 Eq. 281; *Barnard v. Lee*, 97 Mass. 92;

land, time will not, unless there is some material interest dependent upon punctuality, be regarded as essential, and conveyances will be compelled, though there may have been a failure on the plaintiff's part to comply with some preliminary condition as to time.¹ A failure, also, to comply with the condition that the vendor shall deliver an abstract of title within a certain time will not entitle the purchaser to throw up the contract.² A similar rule is adopted as to mortgages, which, in equity, are not regarded as absolute conveyances, but which are securities for the payment of debts. Even though the time for redemption is past, a court of equity will decree satisfaction or reconveyance, as the case may be, on payment of principal and interest.³

§ 889. The parties may, also, by agreement provide that, unless an article be delivered or labor done by a specific time, there shall be no compensation; and, when the time goes to the substance of the contract, this is a bar to the suit.⁴ Contracts for developing mines, in which the value of the contract depends upon prompt action, are illustrations of the rule that time may become essential, from the circumstances of the case.⁵

Forfeiture
may be
fixed by
agreement.

Benedict v. Lynch, 1 Johns. Ch. 375; *Huffmann v. Hummer*, 17 N. J. Eq. 263; *Stow v. Russel*, 36 Ill. 18; *Bonier v. Caldwell*, 8 Mich. 463; *Steele v. Branch*, 40 Cal. 3.

¹ *Leake*, 2d ed. 846; *Bisph. Eq.* 2d ed. § 393; *Seton v. Slade*, 7 Ves. 274, and notes to same in 2 Wh. & Tud. L. C.; *Parkin v. Sherold*, 16 Beav. 59; *Webb v. Hughes*, L. R. 10 Eq. 281; *Patrick v. Milner*, L. R. 2 C. P. D. 342; *Barnard v. Lee*, 97 Mass. 94; *Ives v. Armstrong*, 5 R. I. 567; *King v. Ruckman*, 5 C. E. Green, 316; S. C., 6 C. E. Green, 599; *Patchin v. Lamborn*, 31 Penn. St. 314; *Stow v. Russell*, 36 Ill. 18. Otherwise in cases of wilful neglect. *Banks v. Haskie*, 45 Md. 209; *Prestman v. Silljacks*, 14 Rep. 331.

² *Seton v. Slade*, 7 Ves. 274; *Rob-*

erts v. Berry, 3 D. M. & G. 284. See generally *Snowman v. Harford*, 55 Me. 197; *Edgerton v. Peckham*, 11 Paige, 352; *Tiernan v. Roland*, 15 Penn. St. 429.

³ *Bispham's Eq.* §§ 364, 389; *Seton v. Slade*, 7 Ves. 273; *Egmont v. Smith*, L. R. 6 Ch. D. 475; *Malin v. Malin*, 1 Wend. 625; *King v. Ruckman*, 6 C. E. Green, 599; *Brewer v. Fleming*, 51 Penn. St. 113; *Napin v. Darlington*, 70 Penn. St. 64.

⁴ *Ripley v. Maclure*, 4 Ex. 345; *Westerman v. Means*, 12 Penn. St. 97; *Barnard v. Lee*, 97 Mass. 94; *Wiswall v. McGown*, 2 Barb. 270; *Kemp v. Humphreys*, 13 Ill. 573.

⁵ *Bisph. Eq.* 2d ed. § 393; *Macbryde v. Weekes*, 22 Beav. 533; *Parker v. Frith*, 1 Sim. & St. 199, n.

§ 890. A party who has himself encouraged delay, or who has been otherwise negligent, cannot inflict on another a forfeiture consequent on the latter failing to come up to time.¹ The extension of negotiations by one party beyond the time fixed precludes him from taking advantage of the delay of the other party, so far as that delay is not excessive.² Thus, in a case in Connecticut in 1880, a purchaser of land at \$700, having failed to pay at the date stipulated, afterwards made payments from time to time, which were accepted by the vendor without objection, until nearly a year after the date, when only ten dollars remained due, which sum was then tendered but refused. It was held that it was then too late for the vendor to refuse specific performance on the ground that time was of the essence of the contract.³ On the other hand, a party who delusively institutes a negotiation which he intends to be fruitless cannot set up the negotiation as precluding the other party from insisting on his rights.⁴ And, when negotiations have ceased, they cannot be set up as excusing either party from the liabilities imposed on him, though a party may by delay, after the closing of negotiations, preclude himself from claiming specific performance.⁵

Forfeiture from lapse of time cannot be exacted by dilatory party.

§ 891. Unless, also, punctuality goes to the substance of an engagement, a failure to keep time is waived by an acceptance of the goods or services; and if the promisee has sustained any loss by the delay as to time, he must prove it as a matter of set-off, or use it to sustain a cross-action, as the local practice may require.⁶

Punctuality waived by acceptance.

¹ Gardner *ex parte*, 4 Y. & C. Ex. 503; Taylor *v.* Longworth, 14 Pet. 172; Rogers *v.* Saunders, 16 Me. 92; Eastman *v.* Plumer, 46 N. H. 464; Benedict *v.* Lynch, 1 Johns. Ch. 370; Merritt *v.* Brown, 6 C. E. Green, 401; Johns *v.* Norris, 7 C. E. Green, 102; see generally *supra*, §§ 312, 325, 603.

² Hudson *v.* Bartram, 3 Madd. 440; Wood *v.* Bernal, 19 Ves. 220; McMurray *v.* Spicer, L. R. 5 Eq. 529; Webb *v.* Hughes, L. R. 10 Eq. 281; cited Leake, 2d ed. 850; Flaggy *v.* Dryden, 7 Pick. 52; Benedict *v.* Lynch, 1 Johns. Ch. 375; Lounsbury *v.* Bank, 46 Conn. 291; Leaird *v.* Smith, 44 N. Y. 618; Bass *v.* White, 65 N. Y. 565.

³ Lounsbury *v.* Beebe, 46 Conn. 291.

⁴ Gee *v.* Pearse, 2 De G. & Sm. 325.

⁵ Leake, 2d ed. 850; Alley *v.* Deschamps, 13 Ves. 225; Heaphy *v.* Hill, 2 Sim. & S. 29; Eads *v.* Williams, 4 D. M. & G. 691; Pollard *v.* Clayton, 1 K. & J. 462.

⁶ Benj. on Sales, 3d Am. ed. § 320; Lucas *v.* Godwin, 3 Bing. N. C. 737;

As we have just seen, also, continued negotiations, after a failure in punctuality, waive the laches;¹ and so of any form of acceptance after breach.²

§ 892. Even when time is not on the face of a contract essential, it may become so by one party notifying the other that it is essential that a thing required to be done by the contract should be done on a particular day, supposing that this notice is reasonable.³

Time may
by notice be
made es-
sential.

But the notice, to have this effect, must be unequivocal, and must declare that the contract will be abandoned if not performed on that day.⁴ And when a contract provides that the promisor shall perform his promise on notice from the promisee, then notice is essential to the maturing of the duty.⁵

§ 893. Obligatory documents, including negotiable papers, bonds, and deeds, are presumed to have been delivered on the date they bear.⁶ But extrinsic evidence is admissible to prove that the date either of execution or of delivery is not that set forth in the document.⁷ And the presumption does not extend to

Nominal
date pre-
sumed to
be real.

Lindsey v. Gordon, 13 Me. 60; *Warren v. Mains*, 7 Johns. 476; *Church v. Feterow*, 3 Pen. & W. 301; *Choice v. Moseley*, 1 Bailey, 136; *Lawrence v. Dougherty*, 5 Yerg. 435; *Miller v. McClain*, 10 Yerg. 245. For waiver of conditions, see *supra*, §§ 602-4.

¹ *Webb v. Hughes*, L. R. 10 Eq. 281; and cases cited *supra*, § 890.

² *Flagg v. Dryden*, 7 Pick. 52; and cases cited *supra*, § 890.

³ *Leake*, 2d ed. 851; *Dart, V. & P.* 418; *Taylor v. Brown*, 2 Beav. 180; *Benson v. Lamb*, 9 Beav. 502; *Parkin v. Therold*, 16 Beav. 59; *Nott v. Ricard*, 22 Beav. 307; *McMurray v. Spicer*, L. R. 5 Eq. 527; *Crawford v. Toogood*, L. R. 13 Ch. D. 153; *Barnard v. Lee*, 97 Mass. 94; *Ives v. Armstrong*, 5 R. I. 567; *King v. Ruckman*, 5 C. E. Green, 316; *S. C.*, 6 C. E. Green, 599; *Thompson v. Dullas*, 5 Rich. Eq. 370.

⁴ *Reynolds v. Nelson*, 6 Madd. 18; see *Webb v. Hughes*, L. R. 10 Eq. 281.

⁵ *Hodsdon v. Harridge*, 2 Wms. Saun. 62 a, n.; see fully, *supra*, §§ 567 *et seq.*

⁶ *Wh. on Ev.* § 977; *Leake*, 2d ed. 844; *Hunt v. Massey*, 5 B. & Ad. 902; *Sinclair v. Baggaley*, 4 M. & W. 312; *Anderson v. Weston*, 6 Bing. N. C. 296; *Fowler v. Melville*, 11 How. U. S. 375; *Smith v. Porter*, 10 Gray, 66; *Costigan v. Gould*, 5 Denio, 290; *Livingston v. Arnoux*, 56 N. Y. 518; *Claridge v. Klett*, 15 Penn. St. 255; *Meadows v. Cozart*, 76 N. C. 450.

⁷ *Wh. on Ev.* § 977; *Butler v. Mountgarrett*, 7 H. of L. C. 633; *Hall v. Cazenave*, 4 East, 477; *Cooper v. Robinson*, 10 M. & W. 694; *Sweetser v. Lowell*, 33 Me. 446; *Clark v. Houghton*, 12 Gray, 38; *Draper v. Snow*, 20 N. Y. 331; *Serviss v. Stockstill*, 30 Oh. St. 418.

third parties.¹ When there is no date, the time of execution and delivery is provable by parol; but where there is no parol proof, the instrument (*e. g.*, a bill of exchange) dates from the day in which it is drawn.² And when a thing is to be done "ten days from the date," and the contract is not executed until twenty days after date, then the time of the execution of the contract will be taken as the starting point.³

§ 894. The date at which a lease begins is determinable by the context.⁴ When the term is declared to begin "with the making hereof," or "from henceforth," without reference to any date given in the body of the document, the term begins on the day of execution and delivery, including that day; if the term begins "*from* the making hereof," or "*from* the day of delivery," then the day of making or of delivery is excluded.⁵

Date of beginning of lease determined by context.

§ 895. When a liability is to begin at a specific day (*e. g.*, rent from Jan. 1st), and to end after the lapse of a designated time from that date (*e. g.*, one year from Jan. 1st), then the first day is excluded and the last day included in the period of liability.⁶ "The general understanding is, that terms of years last during the whole anniversary of the day from which they are granted. If this were otherwise, the last day, on which the rent is almost uniformly made payable, would be posterior to the lease."⁷ A term of service, however, will be construed to begin on a designated day, so as to include that

When liability continues from one specified day to another, the first is excluded, and the last is included.

¹ Larns *v.* Rand, 3 C. B. N. S. 442.

² Leake, 2d ed. 844; Hague *v.* French, 3 B. & P. 173; Giles *v.* Browne, 6 M. & S. 73.

³ Styles *v.* Wardle, 4 B. & C. 908.

⁴ Steele *v.* Mart, 4 B. & C. 272; Sandill *v.* Franklin, L. R. 10 C. P. 377.

⁵ Leake, 2d ed. 843; citing Co. Lit. 46 b; Clayton's case, 5 Co. 1; Jaques *v.* Millar, L. R. 6 C. D. 153.

⁶ Leake, 2d ed. 841; Benj. on Sales, 3d Am. ed. § 684; Lester *v.* Garland, 15 Ves. 257; Gorst *v.* Lowndes, 11 Sim. 434; Robinson *v.* Waddington,

13 Q. B. 753; Webb *v.* Fairmaner, 3 M. & W. 473; Young *v.* Higgins, 6 M. & W. 49; Isaacs *v.* Ins. Co., L. R. 5 Ex. 296; Oatman *v.* Walker, 33 Me. 71; Blake *v.* Crowninshield, 9 N. H. 304; Bigelow *v.* Wilson, 1 Pick. 485; Farwell *v.* Rogers, 4 Cush. 460; Sands *v.* Lyon, 18 Conn. 28; Weeks *v.* Hull, 19 Conn. 376; Cornell *v.* Moulton, 3 Denio, 12; Thomas *v.* Afflick, 16 Penn. St. 14; Cleveland *v.* Sterritt, 70 Penn. St. 204; and see Buttrick *v.* Holden, 8 Cush. 233; *supra*, § 884.

⁷ Per cur. Ackland *v.* Lutley, 9 A. & E. 879; cited Leake, 2d ed. 841.

day, if such appears to have been intended by the parties;¹ though ordinarily when service is to begin from the first of the month, it excludes that day.² Notice to be given at a specific time after an event does not begin to run until the day after the event;³ notice of action, or notice to quit, or, in general, any notice on which a claim is conditioned, dates, when a specific lapse of time is required, from the day after the date.⁴ When goods are to be paid for in a month, the day of the bargain is not to be counted in.⁵ A policy of insurance, also, "from 14th February to 14th August," includes the fourteenth of August, on which day a fire takes place.⁶ But where a policy of insurance covered goods to be shipped between "February 1st and July 15th," it was held not to include goods shipped on July 15th.⁷—It has been held in Pennsylvania, that a contract to complete a work "by the month of November," requires the work to be done before November sets in.⁸

§ 896. In mercantile obligations, "month," by the custom of merchants, means "calendar" month.⁹ In other contracts,

¹ *Pugh v. Leeds*, 2 Cowp. 714; *Bigelow v. Wilson*, 1 Pick. 485.

² *Wilkinson v. Gaston*, 9 Q. B. 137.

³ *Pellew v. Wonford*, 9 B. & C. 134.

⁴ *Leake*, 2d ed. 842; *Young v. Higgon*, 6 M. & W. 49; *Freeman v. Read*, 4 B. & S. 174. As to notice as a condition precedent, see *supra*, §§ 567 *et seq.* That the day of the performance of a particular condition precedent is to be excluded from the calculation, see cases cited above, and *Blake v. Crowinshield*, 9 N. H. 304; *Bigelow v. Wilson*, 1 Pick. 485; *Wiggin v. Peter*, 1 Met. 127; *Weeks v. Hull*, 19 Conn. 376; *Cornell v. Moulton*, 3 Denio, 12; *Bissell v. Bissell*, 11 Barb. 96; *Thomas v. Afflick*, 16 Penn. St. 14.

⁵ *Webb v. Fairmaner*, 3 M. & W. 473; *Weeks v. Hull*, 19 Conn. 376; *Judd v. Fulton*, 10 Barb. 117; *Bissell v. Bissell*, 11 Barb. 96; *Cornell v. Moulton*, 3 Denio, 12; *Thomas v. Afflick*, 16 Penn. St. 14.

⁶ *Isaacs v. Ins. Co.*, L. R. 5 Ex. 296.

⁷ *Atkyns v. Ins. Co.*, 5 Met. 439.

⁸ *Rankin v. Woodworth*, 3 P. & W. 48; see *Miller v. Phillips*, 31 Penn. St. 221. The court of exchequer was equally divided, in *Coddington v. Paleologo*, L. R. 2 Ex. 193, on the question whether, on a contract for the delivery of goods, "delivering on April 17th, complete 8th May," the vendor was required to begin the delivery on April 17th. See *Newby v. Rogers*, 40 Ind. 9. That when a particular time is allotted, the whole time is to be given, see *supra*, §§ 884-5.

⁹ *Benj. on Sales*, 3d Am. ed. § 684; *Leake*, 2d ed. 844; *Hart v. Middleton*, 2 C. & K. 9; *Lang v. Gale*, 1 M. & S. 111; *R. v. Chawton*, 1 Q. B. 250; *Webb v. Fairmaner*, 3 M. & W. 473; *Churchill v. Bk.*, 19 Pick. 532; *Leffingwell v. White*, 1 John. Ca. 99; *Thomas v. Shoemaker*, 6 Watts & S. 179.

it is held in England, that “‘months’ denote at law ‘lunar months’ unless there is admissible evidence of an intention in the parties using the word to denote ‘calendar month.’”¹ In this country the practice is to take calendar months as the standard in all cases.² In England evidence of custom that the word is used as a calendar month has been held admissible when business contracts are litigated.³—In construing acts of parliament “month” is held, at common law, to mean “lunar” month unless the context shows a calendar month was meant;⁴ though by stat. 13 Vict. c. 21, it is enacted that “in all acts the word ‘month’ shall be taken to mean ‘calendar month.’” And in this country, in legal proceedings, the latter meaning is generally attached.⁵

§ 897. When the time for the performance of a contract falls on a Sunday, the performance may be tendered on the next Monday.⁶ The same rule is applicable to payments on policies of insurance.⁷ A tender, also, when due on Sunday, may be made on Monday.⁸ But if a contract is to be performed in a certain

“Month”
in mercan-
tile con-
tracts
means
“calendar”
month.

When time
falls on
Sunday de-
livery may
be on next
day.

¹ Per cur. *Simpson v. Margitson*, 11 Q. B. 23. To same effect see *Lang v. Gale*, 1 M. & S. 111; *Cockell v. Gray*, 3 B. & B. 186; *R. v. Chawton*, 1 Q. B. 247; *Hutton v. Brown*, 45 L. T. N. S. 343. Thus “month” has been held to mean “lunar-month” in an agreement for the hire of furniture at a weekly rental, provided that the first payment should be made on the following Monday, and the succeeding payments on each succeeding Monday, “the said letting on hire to be for the term of twenty-six months from the date of the first payment herein mentioned.” *Hutton v. Brown ut supra*.

² Story on Bills, §§ 143, 330; Story on Contracts, § 1328, citing 4 Kent’s Com. Lect. 56, p. 95; *Hunt v. Holden*, 2 Mass. 170; *Avery v. Pixley*, 4 Mass. 460. “In popular language four weeks are called a month, being nearly the

length of the lunar month; a calendar month consists of 28, 29, 30, or 31 days, as the month stands in the calendars or almanacs.” Webster’s Dict. tit. “Month.”

³ Leake, 2d ed. 844; *Simpson v. Margitson*, 11 Q. B. 23; *Jolly v. Young*, 1 Esp. 186; *Cockell v. Gray*, 3 B. & B. 186; *Webb v. Fairmaner*, 3 M. & W. 476.

⁴ *Crooke v. M’Tavish*, 1 Bing. 307.

⁵ *Churchill v. Bank*, 19 Pick. 532.

⁶ *Stebbins v. Leowolf*, 3 Cush. 137; *Hammond v. Ins. Co.*, 10 Gray, 306; *Avery v. Stewart*, 2 Conn. 69; *Sands v. Lyon*, 18 Conn. 18; *Delamater v. Miller*, 1 Cow. 75; *Salter v. Burt*, 20 Wend. 205; *Bass v. White*, 65 N. Y. 565; *Barrett v. Allen*, 10 Ohio, 426.

⁷ *Hammond v. Ins. Co.*, 10 Gray, 306.

⁸ *Barrett v. Allen*, 10 Ohio, 426.

number of days, and this number includes Sundays, they are to be counted in as making up the aggregate; though if the contract matures on a Sunday, the next day is to be that in which the performance is to be exacted.¹ On the other hand, when negotiable paper becomes due on Sunday, the demand should be on the prior Saturday.² "If the last day of grace is on Sunday, the note is payable and the grace expires on the preceding Saturday. And if two holidays should succeed each other, as Sunday on the 24th of December, and Christmas on the 25th of December, the note would be due and payable on the preceding Saturday, the 23d of December."³

IV. QUANTITY AND QUALITY.

§ 898. When a specific quantity is stipulated for, the purchaser is entitled to demand this quantity. If less
 Quantity stipulated for must be delivered. be delivered he may refuse to receive it; or if a partial delivery be made, with a promise to follow it up by sending the rest, he may return what he has thus received when he finds that the residue will not be delivered in time,* though by accepting a part without objection he disaffirms the entirety of the contract.⁵ Or, if a larger quantity is sent him, and the mass is not readily divisible, he may refuse to accept *in toto*.⁶ If, however, he accept what is delivered to him, whether greater or less than the amount agreed on, then he is liable in goods sold and delivered for what he re-

¹ *Brown v. Johnson*, 10 M. & W. 331; *King v. Dowdell*, 2 Sandf. 131.

² Story on Contracts, § 1328; Story on Notes, § 220; Story on Bills, § 338; *Homes v. Smith*, 20 Me. 284; *Salter v. Burt*, 20 Wend. 205; *Stebbins v. Leowolf*, 3 Cush. 137.

³ Story on Notes, 7th ed. (1876), § 220. In *Stebbins v. Leowolf*, 3 Cush. 137, the supreme court of Massachusetts, as the contract before them was by New York parties, and the contract was to be performed in New York, followed what they held to be the New York rule, which is that given in the text, though it was said that the point

was one as to which "there had not been an entire unanimity of decision."

⁴ *Supra*, §§ 190-1, 259, 293, 579, 601; *Benj. on Sales*, 3d Am. ed. § 690; *Morgan v. Gath*, 3 H. & C. 748; *Waddington v. Oliver*, 2 B. & P. N. R. 61.

⁵ *Roberts v. Beatty*, 2 P. & W. 63.

⁶ *Leake*, 2d ed. § 24; *Benj. on Sales*, 3d Am. ed. §§ 47, 691; *Cross v. Eglin*, 2 B. & Ad. 106; *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; *Levy v. Green*, 8 E. & B. 575; *Rylands v. Kreitman*, 19 C. B. N. S. 351; and see *supra*, §§ 579 *et seq.* That rescission may be granted on failure of part performance, see *supra*, § 293, 580.

ceives.¹ A slight nominal variance in the amount of work done, or of material delivered, when the contract is substantially performed, is no defence.²

§ 899. When a duty is divisible, it may be performed in parts, and the receiver may be chargeable *pro tanto*, and a vendee to whom a part of an order of divisible goods is delivered is liable for what he received, unless he has suffered damage to that amount by the vendor's non-performance.³ Hence on a contract to publish a work in numbers, at so much a number, it has been held that on partial performance there may be partial recovery.⁴ On a contract, also, to deliver two hundred stove patterns, a part only of which were made, it was held that the vendor was entitled to recover on a *quantum meruit* for what was accepted by the vendee, deducting any damages the latter sustained from the non-completion of the contract.⁵—A contract to deliver 50,000 tons of coal in a year, in shipments at the rate of 6000 tons per month, at the buyer's option, on notices to be given on a day specified in each month as to the amount to be delivered in the next month, is divisible; and it has been held that on such a contract, after part performance, the fact that a portion of the coal received consisted of coal inferior to that contracted for, does not give the vendee the right to rescind. His remedy is set-off or suit for dam-

When duty is divisible, performance may be partial.

¹ Benj. on Sales, §§ 47, 690; Waddington v. Oliver, *ut supra*; Oxendale v. Wetherill, 9 B. & C. 386; Champion v. Short, 1 Camp. 53; Morgan v. Gath, 3 H. & C. 748; Booth v. Tyson, 15 Vt. 515; Bowker v. Hoyt, 18 Pick. 556; Marland v. Stanwood, 101 Mass. 470; Wright v. Barnes, 14 Conn. 518; Roberts v. Beatty, 2 P. & W. 63; Rockford, etc. R. R. v. Lent, 63 Ill. 288; Smith v. Lewis, 40 Ind. 98; and see observations of Wilde, J., in Snow v. Ware, 13 Met. 49.

² Gilman v. Hall, 11 Vt. 510; Woodward v. Fuller, 80 N. Y. 812; Chambers v. Jaynes, 4 Barr, 39. That substantial performance is sufficient, see *supra*, §§ 607, 869.

³ *Supra*, §§ 579, 712. See last sec-

tion, and to same effect, Glazebrook v. Woodrow, 8 T. R. 366; Bowker v. Hoyt, 18 Pick. 555; Foxall v. Fletcher, 59 How. Pr. 88; Shaw v. Badger, 12 S. & R. 275; Sinnott v. Mullin, 82 Penn. St. 333. As to effect of partial impossibility, see *supra*, § 330. That when after a partial delivery of goods final delivery is prevented the vendor may maintain *indebitatus assumpsit*, see *supra*, § 712. As to whether a contract is rescinded by refusal to accept instalments, see *supra*, § 580.

⁴ Mavor v. Pyne, 3 Bing. 235; *supra*, § 712.

⁵ Booth v. Tyson, 15 Vt. 515; and see generally Roberts v. Havelock, 3 B. & Ad. 409; and cases cited *supra*, § 712.

ages.¹—"The buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed, he must either return or pay for the part received, and cannot insist on retaining it without payment until the vendor makes delivery of the rest."²—In New York, however, it is held that where there is a contract to deliver a specified quantity of goods, on a particular day, at a lumping price, to be paid on delivery and acceptance of the whole, the vendor cannot recover in goods sold and delivered for a part delivered and accepted by the purchaser.³—So far as concerns sales of real estate, when there has been a partial failure of consideration, and the contract is in this respect divisible, there can be a recovery for the portion of the contract as to which the consideration holds good.⁴

¹ *Scott v. Coal Co.*, 89 Penn. St. 231; see *supra*, § 580; and see, to same effect, *Tenny v. Mulvaney*, 8 Oregon, 129. That a contract to peel a certain quantity of hemlock timber by a specified date, and to start the timber on good roads, D. to have the bark when started as his remuneration, is not divisible, see *Hartley v. Decker*, 89 Penn. St. 470. That delivery of successive instalments may be conditioned on delivery of first, see *supra*, § 580. No precise rule can be given by which the question whether a contract is entire or divisible can be determined. Like most other questions of construction, it depends upon the intention of the parties to be gathered from what appears upon the face of the contract and surrounding circumstances. *Gray v. Hinton*, 2 McCrary, 167.

² *Benj. on Sales*, 3d Am. ed. § 690, citing in addition to cases cited above, *Star Glass Co. v. Morey*, 108 Mass. 570; *Shields v. Pettee*, 2 Sandf. 202; *McKnight v. Devlin*, 52 N. Y. 399; *Richards v. Shaw*, 67 Ill. 222; *Wilson v. Wagar*, 26 Mich. 452.

³ *Mead v. Degolyer*, 16 Wend. 632; *Champlin v. Rowley*, 18 Wend. 187;

Paige v. Ott, 5 Denio, 406; *Baker v. Higgins*, 21 N. Y. 397; *McKnight v. Devlin*, 52 N. Y. 399; *Kein v. Tupper*, 52 N. Y. 550; and see *Witherow v. Witherow*, 16 Ohio, 238; *Benj. on Sales*, 3d Am. ed. § 47; 2 Pars. on Cont. 659. In a case in New York in 1880, C. contracted for \$1500 to put up on O.'s premises a gas machine; but O., after receiving the castings and materials, refused to permit C. to put up the gas machine. It was held that O. was liable for damages for breach of contract, but not for the contract price. *Butler v. Butler*, 77 N. Y. 472.

⁴ *Supra*, §§ 191, 898; *Morris v. Phelps*, 5 Johns. 49; *Melick v. Dayton*, 34 N. J. Eq. 245; *Johnson v. Churchill*, 49 Iowa, 257; see *supra*, §§ 520, 746.

In *Messer v. Oestreich*, 52 Wis. 684, we have the following from Cassaday, J.: "When the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin and right to convey (or upon an agreement to convey) such a proportion of the whole consideration paid as the value of the part to which the title fails bore to the whole purchase-price at the time of the purchase,

§ 900. It is otherwise when an aggregate quantity of labor

with interest thereon during the time he has been deprived of the use of such part, not exceeding six years. In *Flureau v. Thornhill*, 2 W. Black 1078, Blackstone, J., said: 'These contracts are merely upon condition, frequently expressed but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected.' In *Statts v. Ten Eyck*, 5 Caines, 111, it was held that 'under a covenant of ownership, seizin, power to sell, and for peaceable enjoyment, if the vendee be evicted he can recover only the value of the land at the time of the purchase, with interest for so long a time as he pays mesne profits, and the costs of ejectment, that he brought against him, but not those of the action for mesne profits.' In that case the consideration paid was taken as the value of the land, and Kent, C. J., in his opinion, says that 'the interest ought to be calculated on the consideration sum.' Page 115. That case was followed and approved in *Pitcher v. Livingston*, 4 Johns. 1; *Caulkins v. Harris*, 9 id. 324; *Bennett v. Jenkins*, 13 id. 50. See, also, *Cox v. Henry*, 32 Penn. St. 18; *Willson v. Willson*, 25 N. H. 229. In *Pitcher v. Livingston* the value was restricted to the amount of the consideration paid. In *Caulkins v. Harris* the grantee held possession for fifteen years before he was evicted, but he was only allowed interest on the consideration paid for six years, because that was the limit of time for which he was answerable for mesne profits, and the same rule was adopted in *Bennett v. Jenkins* and *Cox v. Henry*. The rule that the recovery shall not exceed the amount of the consideration paid and interest has been extended to covenants against liens and

encumbrances in several of the states. *Grant v. Tallman*, 20 N. Y. 191; *Dimmick v. Lockwood*, 10 Wend. 142; *Cox v. Henry*, 32 Penn. St. 18; *Willson v. Willson*, 25 N. H. 229; *Foot v. Burnett*, 10 Ohio, 317. The rule thus stated and the cases cited in support of it are in harmony with the decisions of this court. *Rich v. Johnson*, 2 Pinney, 88; *Blossom v. Knox*, 3 id. 262; *Pillsbury v. Mitchell*, 5 Wis. 17; *Noonan v. Ilsley*, 21 id. 140; *Nichol v. Alexander*, 28 id. 118. But where, as in this case, there is a failure of title to only a fractional portion of the land purchased, is the same rule of damages applicable? In *Morris v. Phelps*, 5 Johns. 49, the title to one-sixth of the two tracts described in one deed failed, and the title to five-sixths of the tract described in another deed failed, and Kent, C. J., giving the opinion of the court, makes this statement, and cites from the Year Books and Coke in support of it: 'The plaintiff was entitled to recover damages only in proportion to the extent of the defect of title. This is an old and well-settled rule of damages, that if one be bound to warrant, he warrants the entirety; but he shall not render in value but for that which was lost.' He concluded thus: 'There is then no law or reason why the plaintiff should recover more than one-sixth of the consideration-money and interest for the two tracts mentioned in the first count, and five-sixths of the consideration-money and interest for the tract contained in the second count?' To the same effect are *Guthrie v. Pugsley*, 12 Johns. 126; *Wager v. Schuyler*, 1 Wend. 553; *Dimmick v. Lockwood*, 10 Wend. 142; *Cornell v. Jackson*, 3 Cush. 506; *Partidge v. Hatch*, 18 N. H. 494; *Ela v. Card*, 2 id. 175."

Otherwise when aggregate is contracted for.

or of material is contracted for in such terms as to show that what the promisee contracts for is the thing as a whole. In such case if the promisor voluntarily desist from completing his engagement, after having partially complied with it, he cannot recover for the fractional services rendered, or the fractional material delivered.¹ An agreement, for instance, by A. to find for a fixed fee a purchaser for a farm, only entitles A. to a fee in case he finds a purchaser for the farm as entire.² Where, also, the part of a property sold as to which there is a failure of title, is essential to the residue, the contract is indivisible;³ and so where a horse and mare, forming a pair, are sold, though by different bids, at a public sale.⁴ But where a contract for labor is suspended by sickness or death, the employee (or his representatives) may recover for the services actually rendered, deducting any damages the employer may have received from non-fulfilment of contract.⁵ The same rule obtains in respect to work on an article subsequently destroyed by *casus*.⁶

¹ See *Benj. on Sales*, § 689; *Lovatt v. Hamilton*, 5 M. & W. 639; *Reuter v. Sala*, L. R. 4 C. P. D. 239; *Philbrook v. Belknap*, 6 Vt. 383; *Ripley v. Chipman*, 13 Vt. 268; *Olmstead v. Beale*, 19 Pick. 528; *Croninger v. Crocker*, 62 N. Y. 151; *Highland Chem. Co. v. Matthews*, 75 N. Y. 145; *Martin v. Schoenberger*, 8 W. & S. 367; *Hartley v. Decker*, 89 Penn. St. 470; see *supra*, § 552.

² *Weber v. Clark*, 24 Minn. 354.

³ *Graver v. Scott*, 80 Penn. St. 88; see *Quigley v. De Haas*, 82 Penn. St. 267; see *supra*, § 552.

⁴ *Kerr v. Shrader*, 1 Weekly Notes, 33.

⁵ See *supra*, §§ 303 *et seq.*; §§ 580, 716, and particularly cases cited *supra*, § 716.

⁶ *Supra*, § 316. In *Reuter v. Sala*, L. R. 4 C. P. D. 289, the plaintiff agreed to sell the defendants "about

25 tons (more or less) Penang black pepper, October and November ship-
or

ment from Penang to London, the name of vessel and particulars to be declared within 60 days from date of bill of lading. The plaintiffs declared within the stipulated time 25 tons, by a vessel called the *Borga*, but only 20 tons complied with the terms of the contract as to shipment, and no further declarations were made. It was held by Cotton and Thesiger, L. JJ., that the contract was entire, and that the defendants could not be compelled to accept the 20 tons." Brett, J., diss.— "I cannot consider," said Cotton, L. J., "the case of *Brandt v. Lawrence*, L. R. 1 Q. B. D. 344, as laying down a general rule of construction, but merely as deciding that the contract in that case having regard to the words 'vessel or vessels' was divisible."

§ 901. When the full performance of the contract is prevented by the interference of the party to whom the work or the goods are to be delivered, he cannot, when the contract is entire, set up imperfect performance as a defence to a suit for the price.¹ The interruption is his own doing, and he must pay on a *quantum meruit* for what he has received;² or be liable in damages for breach of contract.³—A party to be benefited by the performance of a condition precedent, also, may waive such performance.⁴

Party preventing completion cannot charge the other with consequences of failure.

§ 902. When in a contract the qualifications “about,” or “more or less,” are used, neither party is understood as binding himself to an exact amount. A reasonable variation in bulk, under such a contract, is allowed; and what is reasonable depends upon the circumstances of the particular case.⁵ Thus, in an English case in 1881, *A.*, a commission agent, advised the plaintiffs that the defendants had a quantity of old iron in their yard for sale (“about 150 tons”). The plaintiffs then wrote to the defendants as follows: “We are buyers of good wrought scrap iron, free of light and burnt iron, for our American house, and understand from Mr. A. that you have for sale about 150 tons. We can offer you 80s. per ton.” After several intermediate letters relating to the place of delivery and expense of carting, the defendants wrote, “We accept your offers of the 14th and 19th inst. for old iron, viz.: 80s. per ton. We delivering alongside vessel in one of the London docks. Please let us know when you can send a man here to see it weighed, and also inform us where to send it.” Pre-

“About,” “more or less,” are proximate estimates.

¹ *Supra*, §§ 312, 603-4, 712, 716-7; *Brown v. Kimball*, 12 Vt. 617.

² Story on Cont. § 1330; *supra*, § 712; *Champlin v. Rowley*, 18 Wend. 187; *Updike v. Ten Broeck*, 3 Vroom, 105; *Wilhelm v. Caul*, 2 W. & S. 26; see *Lawrence v. Miller*, 86 N. Y. 131.

³ *Butler v. Butler*, 77 N. Y. 472, cited *supra*, 900.

⁴ *Supra*, § 604.

⁵ *Benj. on Sales*, 3d Am. ed. § 691;

Leake, 2d ed. 824; *Cross v. Eglin*, 2 B. & Ad. 106; *Bourne v. Seymour*, 16 C. B. 337; *Moore v. Campbell*, 10 Ex. 323; *Cockerell v. Aucompte*, 2 C. B. N. S. 440; *Morris v. Levison*, L. R. 1 C. P. D. 155; *Brawley v. U. S.*, 96 U. S. 168; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589; *Melick v. Dayton*, 34 N. J. Eq. 245; *Creighton v. Comstock*, 27 Oh. St. 548.

viously to A.'s communication to the plaintiff, he had seen a heap of iron in the yard of defendants, who were builders, and said, "You seem to have about 150 tons there." The reply was "Yes, or more." The defendants only delivered forty-four tons, that being the quantity of the heap in the yard, and the plaintiffs recovered 50% damages in an action for short delivery. It was held by Grove and Lindley, JJ., that the words "about 150 tons," being merely words of estimate and expectation, and there being no warranty as to quantity, the defendants were not bound to deliver 150 tons. It was further ruled that the subject-matter of the contract was not 150 tons of iron, but the iron which A. had seen in the defendants' yard.¹—"More or less" is to be interpreted according to the intention. It may mean that the figure given will be only slightly varied from.² It may imply simply a conjectural estimate.³ The question is one of intent.⁴—"Say about" has been held to indicate only a conjectural estimate, and not a specific statement of quantity.⁵ "Not less than" indicates a minimum below which the delivery is not to go.⁶—In deeds of real estate, when a farm is described by boundaries, and is stated to contain a specified number of acres, "be the same more or less," a slight discrepancy not indicating fraud or mutual mistake will not avoid the deed or sustain an action for damages.⁷—"Where the sale is for a gross sum, and there are qualifying words used, such as 'more or less,' or equivalent

¹ *McLay v. Perry*, 44 L. T. Rep. (N. S.) 152.

² *Harrington v. Mayor*, 70 N. Y. 604.

— ³ *Callmeyer v. Mayor*, 83 N. Y. 116.

⁴ In *Shickle v. Chouteau*, 10 Mo. Ap. 241, the court held (citing *Cross v. Eglin*, 2 B. & Ad. 106, 110; *Cabot v. Winsor*, 1 Allen, 546, 550; and *Patterson v. Judd*, 27 Mo. 563, 567) that the words "more or less" in a contract will not cover an indefinite quantity, and will allow only a slight departure from the quantity expressed in the contract; and further (citing *Morris v. Levison*, 1 C. P. D. 155; *Leeming v. Snaith*, 16 Q. B. 275), that these

words added to a given quantity expressed in a contract do not create such ambiguity in its terms as to render parol explanation admissible.

⁵ *Gwillim v. Daniel*, 2 C. M. & R. 61; *McConnel v. Murphy*, L. R. 5 P. C. 203. See *Robinson v. Noble*, 8 Pet. 181; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589.

⁶ *Leeming v. Snaith*, 16 Q. B. 275.

⁷ *Galbraith v. Galbraith*, 6 Watts, 112; *Hershey v. Keembortz*, 6 Barr, 128; *Coughenour v. Stauff*, 77 Penn. St. 191; *Kreiter v. Bomberger*, 82 Penn. St. 59.

expressions, they have been held to import that quantity does not enter into the essence of the contract."¹ But the force of the words "about sixty-five acres," is "simply that while the parties do not bind themselves to the precise quantity of sixty-five acres, it imports that the actual quantity is a near approximation to that mentioned, that is to say, within a fraction of an acre, or perhaps it might cover a discrepancy of one or two acres."²—The deficiency, in such cases, in order to justify a rescission, must be so great as to indicate either fraud or radical mutual mistake.³ The terms "about" and "more or less" are not to be so strained as to cover more than those slight aberrations incidental to measurements of the particular class in question.⁴

§ 903. When a contract is for delivery of goods, the goods delivered must correspond in quality with the terms of the contract.⁵ As has been already seen, when goods are warranted to be of a particular quality, the warranty, whether express or implied, can be enforced in a suit for damages;⁶ and when the contract was induced by misrepresentation or fraud, it can be rescinded by the party imposed upon.⁷ Rescission, also, as we have seen, may be granted on failure in part performance.⁸ The question of implied warranty, as has also been seen, depends upon the

Article not answering description may be returned.

¹ Bartol, C. J., *Baltimore Build. Co. v. Smith*, 54 Md. 203; citing *Stebbins v. Eddy*, 4 Mason, 419; *Jones v. Plater*, 2 Gill, 128; *Stull v. Hurtt*, 9 Gill, 446; *Hall v. Mayhew*, 15 Md. 551; *Slothower v. Gordon*, 23 Md. 9; *Tyson v. Hardisty*, 29 Md. 305.

² Bartol, C. J., *ut supra*. A vendor, in a Vermont case in 1880, on a sale of certain lots of ground, told the vendee in good faith that the lots contained 100 acres each; and in the deed it was recited that "said lots supposed to contain one hundred acres each, more or less." In two of the lots it was found, on survey, that there was a material deficiency. It was held that the vendee was entitled to deduct, in paying the purchase-money, the value

of the deficiency. *Darling v. Osborne*, 51 Vt. 148; see *Heath v. Pratt*, 51 Vt. 238.

³ *Noble v. Googins*, 99 Mass. 231; *Belknap v. Sealey*, 2 Duer, 579; *Ketchum v. Stout*, 20 Ohio, 455. See *supra*, §§ 293, 898; *infra*, § 919.

⁴ *Ibid*. See *Quesnel v. Woodlief*, 2 Hen. & M. 173.

⁵ *Supra*, §§ 221–2; *Benj. on Sales*, 3d Am. ed. §§ 657, 661; *Crane v. Roberts*, 5 Greenl. 419; *Goss v. Turner*, 21 Vt. 437; *Gaylord Man. Co. v. Allen*, 53 N. Y. 518; *Hyatt v. Boyle*, 5 Gill & J. 110; *Merriam v. Field*, 24 Wis. 640.

⁶ *Supra*, §§ 221 *et seq.*

⁷ *Supra*, §§ 213, 282.

⁸ *Supra*, § 293; *infra*, § 919.

facts in each particular case.¹ Error as to quality, also, does not sustain rescission of a contract, though misrepresentation in this respect will found an action for damages.² But when a contract calls for an article to effect a particular physical purpose, and the article is from its generic character not fitted for such purpose, then there is no concurrence of minds as to the particular thing, and the article, being unfitted for the purpose, can be returned. When the question is one susceptible of exact determination, and when it can be said that a thing is either absolutely fit or absolutely unfit, then if a party buys a thing that is absolutely unfit under the impression, fostered by the other side, that it is fit, there is no concurrence of minds as to one and the same thing. In such cases the bargain may be repudiated, and the article returned.³ A contract never was made, and there is nothing existing between the parties binding the receiver to keep the article.⁴ It is otherwise as to mere failure in quality.⁵

§ 904. The receiver is not necessarily bound to return goods which do not answer the vendor's description. In cases where there is not absolute incongruity between the thing described and the thing delivered, he may say, "I keep the goods, and sue you for the damage arising from the misdescription." And this rule applies when there is an assertion that an article is fitted physically for a particular purpose, and it is bought for this purpose. This amounts to a warranty;⁶ though it is otherwise when the

Or vendor
may be
sued on
warranty.

¹ *Supra*, §§ 219 *et seq.*

² *Supra*, § 189.

³ *Supra*, §§ 4, 177, 214, 221.

⁴ *Supra*, § 178; and see *supra*, §§ 559 *et seq.*; Benj. on Sales, 3d Am. ed. § 600; Chanter v. Hopkins, 4 M. & W. 399; Henshaw v. Robins, 9 Met. 83; Mansfield v. Trigg, 113 Mass. 350; Hawkins v. Pemberton, 51 N. Y. 198; Dounce v. Dow, 57 N. Y. 21. An agreement that wheat to be delivered shall be "good milling wheat," is a warranty of quality; Jack v. R. R., 53 Iowa, 399; *supra*, § 219.

⁶ *Supra*, § 189.

⁵ *Supra*, § 263; Benj. on Sales, 3d Am. ed. § 656; Leake, 2d ed. 404; Brown v. Edginton, 2 M. & G. 279; Randall v. Newson, L. R. 2 Q. B. D. 102; Laing v. Fidgeon, 6 Taunt. 108; Shepherd v. Pybus, 3 M. & G. 868; Dennett v. Short, 7 Greenl. 150; Mansfield v. Trigg, 113 Mass. 350; White v. Miller, 71 N. Y. 118; Gallagher v. Waring, 9 Wend. 20; Boyd v. Wilson, 83 Penn. St. 319; Wolcott v. Mount, 36 N. J. L. 262; 38 N. J. L. 496; Lord v. Grow, 39 Penn. St. 88; McClung v. Kelly, 21 Iowa, 508; Chicago Packing Co. v. Tilton, 87 Ill. 547.

article is sold to effect an end not susceptible of physical measurement, and in itself conjectural—*e. g.* a specific sold as a means of recovering health. And when an article is sold, not to effect a particular physical purpose, which the vendor warrants it can effect, but merely as having certain characteristics—*e. g.* as being the “patent smoke consuming furnace” of a certain inventor—there is no warranty implied that it will exhibit these characteristics in successful action.¹ And where the purchaser gets what he orders, but neglects to take a warranty as to fitness for use, he is supposed to act with his eyes open, and cannot fall back on an implied warranty;² and so when he buys on his own inspection.³

§ 905. An implied warranty is held to exist that an article made or supplied to the order of the purchaser is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the purchaser, if that purpose be communicated to the vendor when the order is given.⁴ In 1868, in a case already cited,⁵ it was ruled that where an article is sold for a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the vendor, there “is an implied term of warranty that it shall be reasonably

Article supplied to order is warranted to answer order.

¹ *Benj. on Sales*, 3d Am. ed., §§ 656–7; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Deming v. Foster*, 42 N. H. 165; *Pease v. Sabin*, 38 Vt. 432; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Port Carbon Co. v. Groves*, 68 Penn. St. 149; *Rodgers v. Niles*, 11 Oh. St. 48; *Gerst v. Jones*, 32 Grat. 518; see *supra*, § 263. The rule as stated by Mr. Benjamin, *Sales*, 3d Am. ed. § 656, is that “in a sale of goods by description, where the buyer has not inspected the goods, there is, in addition to the condition precedent that the goods shall answer the description, an implied warranty that they shall be salable and merchantable.” To this is cited *Gardiner v. Gray*, 4 Camp. 144; *Jones v. Bright*, 5 Bing. 533.

² *Dounce v. Dow*, 64 N. Y. 411.

³ *Supra*, § 227; *infra*, § 907; *Burney v. Bollett*, 16 M. & W. 644; *Emmerton v. Matthews*, 7 H. & N. 586; *Ward v. Hobbs*, 2 Q. B. D. 338; *Deming v. Foster*, 42 N. H. 165; and see *supra*, §§ 196, 245, 289, 572, 753.

⁴ *Supra*, § 221; *Benj. on Sales*, 3d Am. ed. § 645, citing in note by American editor, *Rodgers v. Niles*, 11 Oh. St. 48; *Byers v. Chapin*, 28 Oh. St. 300; see, also, *Beels v. Olmstead*, 24 Vt. 114; *Hastings v. Lovering*, 2 Pick. 214; *Moses v. Mead*, 1 Denio, 378; *White v. Miller*, 71 N. Y. 118; *Brenton v. Davis*, 8 Blackf. 317; *Babcock v. Trice*, 18 Ill. 420.

⁵ *Jones v. Just*, L. R. 3 Q. B. 197.

fit for the purpose to which it is to be applied.”¹ It was further held that “where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article.”² The merchant who undertakes to fill an order for an article of a particular kind, to answer a particular purpose, stands in this respect on the same footing as the manufacturer. If the article does not correspond to the order, the merchant ought not to deliver it.³

¹ To this is cited *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; and to the same effect see cases in prior section, and *Randall v. Newson*, L. R. 2 Q. B. D. 102, cited *supra*, § 223.

² To this is cited *Laing v. Fidgeon*, 4 Camp. 169; 6 Taunt. 108. Judge Bennett, in a note, refers in addition to *Brown v. Sayles*, 27 Vt. 227; *Pease v. Sabin*, 38 Vt. 432; *Harris v. Waite*, 51 Vt. 480; *Gaylord Man. Co. v. Allen*, 53 N. Y. 515; *Gallagher v. Waring*, 9 Wend. 20; *Rodgers v. Niles*, 11 Oh. St. 48; *Howie v. Rea*, 70 N. C. 559; *Mann v. Everston*, 32 Ind. 355; see, also, cases cited *supra*, § 223. For qualifications see *Hight v. Bacon*, 126 Mass. 10. To same effect see *Howard v. Hoey*, 23 Wend. 350; *Moses v. Mead*, 1 Denio, 378.

³ *Pacific Iron Works v. Newhall*, 34 Conn. 67. Whether a donor (*Geschenkegeber*) is liable for warranty (*Gewährleistung*) is a moot question in the Roman law, the agitation of which dates as far back as Azo. (*Glossa ad L. 1, C. de jure dot. et ad L. 18, § 3, D. de donat.*) Azo maintains that there is a warranty only in cases where expressly promised. This opinion, according to Koch (§ 121), was dominant until the time of Duaren (1557), who maintained that warranty may be implied in all cases of donation. This doctrine was sustained by the most eminent

jurists of the sixteenth and seventeenth centuries. That when a gift is a pure act of bounty, and in no sense based on reciprocity, there can be no warranty implied, has been maintained by high authorities, among whom Koch enumerates Struve, Lauterbach, Stryk, Westenbergh, and Wachtler.

In *Johnson v. Raylton*, 45 L. T. N. S. 374, L. R. 7 Q. B. D. 438, cited *supra*, § 221, it was held that where goods are from a manufacturer it is an implied element in the contract that the goods supplied shall be of his own manufacture. It was further held that the implication may be rebutted by evidence of a contrary practice in a particular trade. On this case the *London Law Times* comments as follows: “In spite of this great difference in the result, not only both courts, but also all the judges in both courts, agree up to a certain point. They agree that if a contract is made with a manufacturer of goods, to whose name or skill a peculiar value attaches, to supply those goods, he is bound to supply them of his own manufacture, even though there be no express agreement to that effect in the contract. For instance, if a man order a picture from the president of the Royal Academy, champagne from Moët and Chandon, or a piano from Broadwood, he is entitled to be supplied with an article of the manu-

§ 906. This is *à fortiori* the case where the purchaser relies on the skill or judgment of the vendor as an assurance that the thing sold will answer the desired purpose; it being understood that confidence is given and received.¹—As has been already seen, selling by a merchant implies merchantability.²

And so when vendor is specially trusted.

§ 907. It is otherwise when the purchaser buys on his own judgment. In such cases the maxim *caveat emptor* applies. The purchaser, such is the understanding of both parties, relies on his own inspection, and not upon any assurances of the vendor.³ Thus where a purchaser inspects personally a specific article sold, and the seller, who is not the manufacturer, makes no warranty, and is guilty of no fraud, and the intended use of the article is not communicated at the time to the vendor, there is no implied

Otherwise when purchaser buys on his own judgment.

facture of that man, or those firms; and that the proposition is equally true whether the article is already in existence, or has to be made. Where, however, the conflict of judicial opinion commences, is with regard to articles to which no such peculiar value can be said to attach, articles of which one maker's make is as good as another's, and which have no special repute or name, or other distinction. With regard to these the majority of the Scottish judges and Lord Justice Bramwell are of opinion that there is no agreement by the seller, though a manufacturer, that the goods shall be of his own make; whereas, the majority of the court of appeal and Lord Young (of the Scotch court) are of a contrary opinion." In the Alb. L. J. of Nov. 26, 1881, the following, in the same connection, is cited from the opinion of the court, in *Chicago Packing and Provision Co. v. Tilton*, 87 Ill. 555, a pork case: "It is plain, however, that a party dealing with a corporation, engaged in business as a manufacturer, and in selling its manufactured goods, and whose name gives no suggestion

to the contrary, has a right to assume, when it offers such goods for sale with nothing to suggest the contrary, that it proposes to sell as a manufacturer, and not as an ordinary dealer in the market, and unless the proof shows satisfactorily that plain notice of its acting in a different character was brought home to the party dealing with such corporation, it cannot insist upon being treated as other than a manufacturer."

¹ *Supra*, §§ 221 *et seq.*; Benj. on Sales, 3d Am. ed. § 661, citing *Randall v. Newson*, L. R. 2 Q. B. D. 102; *Bigge v. Parkinson*, 7 H. & N. 955; *Macfarlane v. Taylor*, L. R. 1 Sc. Ap. 245; *Beals v. Olmstead*, 24 Vt. 114; *Brown v. Sayles*, 27 Vt. 227; *Cunningham v. Hall*, 4 Allen, 273; *Dutton v. Gerrish*, 9 Cush. 89; *Rice v. Forsythe*, 41 Md. 389; *Gammell v. Gumby*, 52 Ga. 504. That a fiduciary relation makes a full disclosure incumbent, see *supra*, § 254.

² *Supra*, § 223.

³ *Supra*, §§ 227, 245; *Chanter v. Hopkins*, 4 M. & W. 399; *Azemar v. Casella*, L. R. 2 C. P. 677; and cases cited *supra*, § 227.

warranty by the vendor that the article is fitted for the use to which the purchaser intended to apply it, although the vendor might have supposed what was the intended use.¹

§ 908. Aside from his liability on warranty, express or implied, a vendor may become liable in an action for injuries to parties to whom he negligently exposes articles of a character likely to produce the injuries inflicted.²

Vendor
may be lia-
ble for neg-
ligence.

Express
warranty
excludes
implied.

§ 909. On the principle *expressio unius est exclusio alterius* an express warranty, when introduced into a contract of sale, is exclusive, and leaves no room for the assumption of an implied warranty.³

§ 910. Proof is admissible of a usage in a particular trade that a particular mode of selling implies a warranty.⁴ But usage cannot be put in evidence to contradict the obvious meaning of the document, unless the allegation be mutual mistake, and the application be to rectify;⁵ nor to introduce a stipulation conflicting with the obligation the law imposes on the parties.⁶

Warranty
may be im-
plied from
usage.

§ 911. An implied warranty that goods are merchantable does not make the vendor liable for any loss they may have sustained through depreciation in their carriage.⁷ It is otherwise, however, when the depreciation occurs before the arrival of the goods at a place where the vendor agreed they should be measured and transferred finally to the purchaser.⁸

Warranty
does not
cover de-
preciation
in transit.

§ 912. A butcher in selling meat for human food warrants it to be fit for food,⁹ though it is otherwise with regard to animals exposed generally for sale in a

Provisions
sold for

¹ *Hight v. Bacon*, 126 Mass. 10.

² *Supra*, § 228; and see *infra*, § 1043 *et seq.*

³ See *supra*, §§ 220, 674.

⁴ *Benj. on Sales*, 3d Am. ed. § 655; *Jones v. Bowden*, 4 Taunt. 847; *Syers v. Jones*, 2 Ex. 111; *Allen v. Prink*, 4 M. & W. 140; *Randall v. Kehlor*, 60 Me. 37; *Eldredge v. Smith*, 13 Allen, 140; see *supra*, § 661.

⁵ *Wh. on Ev.* § 970; *Brown v. Thurston*, 56 Me. 127; *Austen v. Sawyer*, 9

Cow. 40; *Evans v. Waln*, 71 Penn. St. 69; *Cent. R. R. v. Anderson*, 58 Ga. 393; see *supra*, § 661.

⁶ *Dickinson v. Gay*, 7 Allen, 34; *Boardman v. Spooner*, 13 Allen, 353; *Snelling v. Hall*, 107 Mass. 138.

⁷ *Bull v. Robison*, 10 Ex. 342.

⁸ *Cushman v. Holyoke*, 34 Me. 289. As to defective package, see *Gower v. Van Dedalzen*, 3 Bing. N. C. 717.

⁹ *Infra*, § 222.

public market, as to which the only implied warranty is that as far as the seller knows they are not unmarketable.¹ Nor does this implied warranty extend to provisions sold for merchandise which "are packed, inspected, and prepared for exportation."²

domestic
use must
be fit.

§ 913. If the law requires that an article before sale should be stamped in a particular way, then the article must be so stamped in order to comply with the conditions of sale;³ and if the packing is to be in a particular way, then this must be attended to by the vendor.⁴ The goods, also, must be susceptible of sale by the local law.⁵

Conditions
imposed by
local law
must be
complied
with.

§ 914. When there is a sale by sample, goods delivered must correspond with the sample, and if they do not, they may be returned by the purchaser.⁶ But beyond this the implied warranty on a sale by sample does not go. If the goods correspond with the sample, it is not necessary that they should have specific merchantable qualities.⁷ A warranty by sample, however, may be so framed as to include quantity as well as quality.⁸—As is elsewhere shown, on a sale by sample the purchaser should have the means of inspection and examination.⁹

On sale by
sample arti-
cle must
conform to
sample.

¹ *Supra*, § 222; *Emmert v. Matthews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T. 261; *Burnby v. Bollett*, 16 M. & W. 644. As to fraud in warranty, see *supra*, § 263.

² Story on Cont. § 1078, citing *Winsor v. Lombard*, 18 Pick. 57; *Moses v. Mead*, 1 Denio, 378; *supra*, § 222.

³ *Elkins v. Parkhurst*, 17 Vt. 105.

⁴ *Clark v. Pinney*, 7 Cow. 681; 2 Pars. on Cont. 656.

⁵ Wh. Con. of L. §§ 334 *et seq.* See *supra*, § 299.

⁶ *Supra*, § 225; *Benj. on Sales*, 3d Am. ed. § 648; *Leake*, 2d ed. 408; *Hibbert v. Shee*, 1 Camp. 113; *Wells v. Hopkins*, 5 M. & W. 7; *Lorymer v. Smith*, 1 B. & C. 1; *Nichol v. Godts*, 10 Ex. 191; *Bradford v. Manly*, 13

Mass. 139; *Lothrop v. Otis*, 7 Allen, 435; *Oneida Man. Co. v. Lawrence*, 4 Cow. 440; *Boorman v. Jenkins*, 12 Wend. 566; *Moses v. Mead*, 1 Denio, 378; *Borrekins v. Bevan*, 3 Rawle, 23; *Maute v. Gross*, 56 Penn. St. 250; *Boyd v. Wilson*, 83 Penn. St. 314; *Magee v. Billingsby*, 3 Ala. 679.

⁷ *Ibid*; *Parkinson v. Lee*, 2 East, 314; *Mody v. Greyson*, L. R. 4 Ex. 49; *Dickson v. Zizinia*, 10 C. B. 602; *Beirne v. Dord*, 1 Selden, 95; *Cousinery v. Pear-sall*, 40 N. Y. S. C. 113; *Boyd v. Wil-son*, 83 Penn. St. 319; see other cases, *supra*, § 225.

⁸ *Azemar v. Casella*, L. R. 2 C. P. 677.

⁹ *Supra*, § 585; *infra*, § 915.

§ 915. The mere exhibition of a sample does not make a sale by sample. The purchaser may waive the test by sample and require an express warranty,¹ or fall back on his own personal inspection;² or the sample may be expressly stated by the vendor not to be given as a standard, and the purchaser may be notified to purchase at his own risk;³ or the purchaser may not examine the sample, but rely on his own inspection.⁴ In no one of these cases is the sale by sample.

Showing sample is not necessarily selling by sample.

§ 916. When goods are sold by sample, or when they are sold as answering a particular description, the delivery must be such as to enable the purchaser to see whether the goods correspond with the description or the sample, as the case may be.⁵ Hence the purchaser is not bound to accept goods in a closed cask which the vendor declines to open;⁶ nor where the vendor refuses to permit him to select the goods bought out of a larger quantity which the vendor has sent him;⁷ nor where the vendor refuses to permit a comparison of the bulk with the sample;⁸ nor where the inspection is made ineffectual by the vendor's default.⁹ Not only when he is refused inspection, but when on inspection he finds the goods do not correspond with the sample, is the purchaser entitled to reject them.¹⁰ If the vendor refuses to resume the goods, they may

On sale by sample or description purchaser must have opportunity of inspection.

¹ Tye v. Fynmore, 3 Camp. 462.

² Barnard v. Kellogg, 10 Wall. 383.

³ Powell v. Horton, 2 Bing. N. C. 668; Gardiner v. Gray, 4 Camp. 144; Kellogg v. Barnard, 6 Blatch. 279; 10 Wall. 383; Graff v. Foster, 67 Mo. 512; see Russell v. Nicolopulo, 8 C. B. N. S. 362; Heilbutt v. Hickson, L. R. 7 C. P. 438; Oneida Man. Co. v. Lawrence, 4 Cow. 440; Beirne v. Dord, 2 Sandf. 89; 1 Selden, 95; Day v. Raquet, 14 Minn. 273.

⁴ Salisbury v. Stainer, 19 Wend. 159.

⁵ *Supra*, § 565; Benj. on Sales, 3d Am. ed. §§ 594, 648, 695, 701, 896; Leake, 2d ed. 827; Lorymer v. Smith,

1 B. & C. 1; Isherwood v. Whitmore, 11 M. & W. 347.

⁶ Isherwood v. Whitmore, *ut supra*.

⁷ Benj. on Sales, 2d Am. ed. § 701; Dixon v. Fletcher, 3 M. & W. 146; Hart v. Mills, 15 M. & W. 85; Nicholson v. Bradfield Union, L. R. 1 Q. B. 620.

⁸ Toulmin v. Headley, 2 C. & K. 157; Lorymer v. Smith, 1 B. & C. 1.

⁹ Heilbutt v. Hickson, L. R. 7 C. P. 438.

¹⁰ Heilbutt v. Hickson, L. R. 7 C. P. 438; Couston v. Chapman, L. R. 2 Sc. Ap. 250; Grimoldby v. Wells, L. R. 10 C. P. 391; Park v. Tool Co., 4 Lansing, 103.

be sold by the purchaser at the vendor's risk.¹ The burden of proving correspondence in such cases is on the vendor.²

§ 917. It is not necessary, if a large lot is sold, that each item should correspond with the sample. It is enough if there is an average correspondence.³ And, in any view, it is admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represents the average quality of the entire lot sold.⁴

Average correspondence with sample is enough.

§ 918. A vendor may, notwithstanding the correspondence with the sample, be held liable for breach of an express agreement of merchantability.⁵ A sample, also, is assumed to be free from secret defects.⁶ But the sample excludes implied warranty.⁷

Warranty may be added to sample.

V. RESCISSION.

§ 919. We have already seen that rescission may be granted on the application of a party who has made a contract under a mistake;⁸ and so when the other party fails to perform in whole or in part.⁹ We have also seen that to obtain rescission, the party seeking relief must do equity;¹⁰ that he cannot have relief when the other party has suffered serious damage by his conduct;¹¹ that his election to ratify is final, and that he cannot ratify in part and rescind in part;¹² and that ratification may be by conduct.¹³ We have further seen that when there is a part performance, and prevention on the other side, the party partially performing may recover on a *quantum meruit* for what he has done.¹⁴ It should now be noticed in addition that a contract will not in general be rescinded on

On non-performance of condition precedent contract may be rescinded.

¹ Messmore v. Shot Co., 40 N. Y. 438. But see Dickinson v. Gay, 7 422; Gill v. Kauffman, 16 Kan. 571. Allen, 34; and *supra*, § 225.

² Merriman v. Chapman, 32 Conn. 146.

⁷ *Supra*, §§ 225, 914.

⁸ *Supra*, § 282.

³ Leonard v. Fowler, 44 N. Y. 289; see *supra*, § 225.

⁹ *Supra*, §§ 282, 293.

¹⁰ *Supra*, § 285.

⁴ Schnitzer v. Print Works, 114 Mass. 123.

¹¹ *Supra*, § 286.

¹² *Supra*, § 290.

⁵ Mody v. Gregson, L. R. 4 Ex. 49.

¹³ *Supra*, § 288.

⁶ Heilbutt v. Hickson, L. R. 7 C. P.

¹⁴ *Supra*, §§ 579, 712.

the application of one party on the ground of non-performance by the other party, unless the party claiming relief does equity by putting the other party as far as possible in the position he would have been in had the contract not been executed.¹ Thus, a sale of real estate, after conveyance, cannot be rescinded without reconveyance;² nor can the purchaser of a chattel rescind the sale without tendering it, if it have any value, to the vendor.³ But where the vendor, on an executory sale of chattels, has delivered, and the vendee has received, a part of the aggregate to be delivered, and the vendor then makes default as to the remainder, which remainder is susceptible of accurate liquidation, the vendee may rescind the contract, and recover back the corresponding portion of the purchase-money.⁴ Subject to these qualifications, whenever "one party to a contract refuses to execute any substantial part of the agreement, he thereby gives to the other party the option to rescind the entire contract."⁵ A party, also, who prevents the performance of a condition by the other party, or waives the performance, cannot complain of the non-performance.⁶ When one party, also, is prevented from performance by *casus*, the other may rescind.⁷ But the right to rescind must be exercised within reasonable time, though mere lapse of time does not estop, unless there be laches.⁸

¹ *Hunt v. Silk*, 5 East, 449; *Clough v. R. R.*, L. R. 7 Ex. 26; *Fitt v. Casanet*, 4 M. & G. 898; *Lyon v. Bertram*, 20 How. U. S. 149; *Potter v. Titcomb*, 22 Me. 300; *Cook v. Gilman*, 34 N. H. 556; *Hammond v. Buckmaster*, 22 Vt. 375; *Conner v. Henderson*, 15 Mass. 319; *Thayer v. Turner*, 8 Met. (Mass.) 550; *Bartlett v. Drake*, 100 Mass. 176; *Burton v. Stewart*, 3 Wend. 236; *Johnson v. Titus*, 2 Hill, 606; *Pittsburg Turnpike Co. v. Com.*, 2 Watts, 433; *Babcock v. Case*, 61 Penn. St. 427; *Morrow v. Rees*, 69 Penn. St. 368; *Benson v. Cowell*, 52 Iowa, 137.

² *Tisdale v. Buckmore*, 33 Me. 461; *Perley v. Balch*, 23 Pick. 283; *Pearsoll v. Chapin*, 44 Penn. St. 9; and cases cited *supra*, §§ 285 *et seq.*

³ *Tisdale v. Buckmore*, 33 Me. 461; *Getchell v. Chase*, 37 N. H. 110; *Perley v. Balch*, 23 Pick. 282; *Dorr v. Fisher*, 1 Cush. 271.

⁴ *Hill v. Reeve*, 11 Met. 288; citing *Johnson v. Johnson*, 3 B. & P. 162; *Miner v. Bradley*, 22 Pick. 457; *Hayden v. Reynolds*, 54 Iowa, 157.

⁵ *Bell, J., Webb v. Stone*, 24 N. H. 288; and see to same effect, *supra*, §§ 263, 579, 712.

⁶ *Supra*, § 602 *et seq.*

⁷ *Supra*, § 323.

⁸ *Supra*, § 289; *De Bussche v. Alt*, L. R. 8 Ch. D. 314; *Towers v. Barrett*, 1 T. R. 136; *Hodgson v. Davies*, 2 Camp. 530; *Veazie v. Williams*, 3 Story, 612; *Pence v. Langdon*, 99 U. S. 581; *Webb v. Stone*, 24 N. H. 282;

Whether there has been undue delay is a question in part of law and in part of fact to be decided by the jury under the direction of the court.¹ But there can be no rescission on a mere qualified refusal on the other side to perform.²

Getchell *v.* Chase, 37 N. H. 110; Gates ¹ Kingsley *c.* Wallis, 14 Me. 57;
v. Bliss, 43 Vt. 299; Saratoga R. R. *v.* Holbrook *v.* Burt, 22 Pick. 546.
Row, 24 Wend. 74; Masson *v.* Bovet, 1 ² Davison *v.* Jersey Co., 71 N. Y.
Denio, 69; Relf *v.* Eberly, 23 Iowa, 333.
467.

CHAPTER XXIX.

PAYMENT.

I. APPROPRIATION.

Appropriation of payment to be in accordance with debtor's intent, § 923.
Intent to be inferred from circumstances, § 924.

Insolvent distribution must be equal, § 925.

Right is one which third parties cannot exercise, § 926.

If debtor does not appropriate, creditor may do so, § 927.

By Roman law, creditor is regarded as the debtor's agent in appropriation, § 928.

In our law this agency is not recognized, § 929.

Creditor may appropriate to debts not recoverable, § 930.

Debts overdue preferred, § 931.

Creditor's election continues until communicated, § 932.

In accounts where there is no designation, first debt is to be paid, § 933.

In other cases, the law divides equitably, § 934.

II. PARTIAL PAYMENT.

Receipt for less sum may extinguish debt if there be distinctive consideration, § 935.

Plaintiff, by suing part of claim to judgment, may extinguish the whole, § 936.

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III. RECEIPTS.

Receipt open to explanation by parol, § 938.

Receipts may estop as to third parties, § 939.

One of several joint receivers may show that the money was received by his associates, § 940.

Releases must be under seal, or must have consideration, § 941.

IV. PAYMENT BY AND TO AGENTS, EXECUTORS, TRUSTEES, AND JOINT DEBTORS.

Payment by third party on behalf of debtor may discharge debt, § 942.

Payment to an agent is payment to principal, § 943.

So of payment to solicitor or attorney, § 944.

Factors and auctioneers may receive payment, but not brokers, § 945.

Payment to partner is payment to firm, § 946.

Executors may give receipts, § 947.

Trustees have only limited power to receipt, § 948.

Payment by one joint debtor discharges the other, § 949.

Payment to one joint creditor releases debt, § 950.

Joint deposit in bank can only be drawn out by joint order, § 951.

Purchase by stranger may be to take assignment of debt, § 952.

V. PAYMENT BY NEGOTIABLE PAPER.

Receipt of check *prima facie* proof of payment, § 953.

Negotiable security may be taken as mere collateral, § 954.

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Acceptance of immature negotiable paper on account operates as conditional payment, § 956.

Negotiable paper may be accepted in satisfaction, § 957.

May bar suit when holder by negligence releases paper, § 958.

If passed to others, or lost or altered, this may bar suit, § 959.

Void security no payment, § 960.

VI. PAYMENT IN BANK NOTES.

Valid when a legal tender, § 961.

VII. PAYMENT BY LETTER.

Sufficient when in accordance with instructions, § 962.

VIII. PAYMENT IN GOODS, AND SET-OFF.

Payment in goods may, by agreement, be equivalent to payment in money, § 963.

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Debts excluded by statute, and illegal debts, § 965.

IX. EFFECT OF PAYMENT.

Damages for detention of debt limited to interest, § 966.

After suit brought, payment must cover interest and costs, § 967.

I. APPROPRIATION.

§ 923. SUPPOSING several distinct debts are due from A. to B., and B. transmits to A. funds only sufficient to pay a part of those debts, the question arises as to which of them the money is to be applied. And the first rule to be observed is, that if the debtor designates the debt that is to be extinguished first, the money must be appropriated to pay that debt;¹ and if the creditor accept the money, it goes to the specific debt,² no matter what he may say at the time.³ And an appropriation once designated cannot be changed by the creditor without the debtor's assent.⁴

Appropriation of payment to be in accordance with debtor's intent.

¹ Story Eq. Jur. 12th ed. §§ 459*b* *et seq.*; Leake, 2d ed. 914; Chitty on Cont. 11th Am. ed. 1110; Clayton's case, 1 Mer. 605; Simson v. Ingham, 2 B. & C. 72; Mills v. Fowkes, 5 Bing. N. C. 461; Cremer v. Higginson, 1 Mason, 338; U. S. v. Wardwell, 5 Mason, 85; Franklin Bk. v. Cooper, 36 Me. 222; Pierce v. Knight, 31 Vt. 701; Smuller v. Union Canal Co., 37 Penn. St. 68; Lee v. Early, 44 Md. 80; Pindall v. Bank, 10 Leigh, 481; Miller v. Trevellian, 2 Rob. Va. 2; Nutall v. Brannin, 5 Bush, 11; McDaniel v. Barnes, 5 Bush, 183.

² Croft v. Lumley, 5 E. & B. 680; Kitchin v. Hawkins, L. R. 2 C. P. 31; Kershaw v. Kirkpatrick, L. R. 3 Ap. Cas. 345; King v. Andrews, 30 Ind. 429; Champenois v. Fort, 45 Miss. 355.

³ Benj. on Sales, 3d Am. ed. § 746; Peters v. Anderson, 5 Taunt. 596; Waller v. Lacy, 1 M. & G. 54; Reed v. Boardman, 20 Pick. 441.

⁴ Levystein v. Whitman, 59 Ala. 345. The student will find an elaborate essay on the topic in the text in Ihering's Jahr. for 1874, vol. 14, under the title "Auf welche von mehreren Forderungen eine geleistete Zahlung

§ 924. If the debtor do not expressly designate the debt

that is to be extinguished by the payment, his intent as to the appropriation of the payment may be inferred from all the circumstances of the case.¹

Thus it has been held that the proceeds of a mortgaged estate will be appropriated to the discharge of the mortgage debt, though there were earlier debts due from the same debtor to the same creditor, supposing no one of these debts is a specific lien on the fund.² When one of two debts is disputed, and the other is admitted, the payment will be presumed to have been intended by the debtor to have been appropriated to the undisputed debt.³—Intention may be proved by parol evidence of directions given by the debtor.⁴ But “the mere avowal of an intention to apply a fund or have it applied in a particular way, has never yet been held to be an application of it.”⁵—When a payment is of a sum precisely the same

abzurechnen ist, von Henrici, Vice-Präsident im Königlich Preuss. Obertribunal.”

¹ Chitty on Cont. 11th Am. ed. 1111; Leake, 2d ed. 915; Benj. on Sales, 3d Am. ed. § 747; Newmarch v. Clay, 14 East, 244; Robert v. Garnie, 3 Caines, 14; Foster v. McGraw, 64 Penn. St. 464; McKelvey v. Jarvis, 87 Penn. St. 414; Young v. English, 7 Beav. 10; Nash v. Hodgson, 6 D. M. & G. 474; Tayloe v. Sandiford, 7 Wheat. 14; Hunt v. Brewer, 68 Me. 262; Scott v. Ray, 18 Pick. 361; Mitchell v. Dall, 2 Har. & G. 159; 4 Gill & J. 361; Fowke v. Bowie, 4 Har. & J. 566; Pickett v. Bank, 32 Ark. 346; see Levystein v. Whitman, 59 Ala. 345; Jones v. Manney, 7 Lea (Tenn.) 341; Trullinger v. Kofoed, 7 Ore. 228.

² Stoveld v. Eade, 4 Bing. 154; Sanders v. Knox, 57 Ala. 80; Pattison v. Hall, 9 Cow. 747; and cases *infra*, § 929. And see generally as sustaining the position of the text, Baker v. Stackpoole, 9 Cow. 420; Martin v. Draker, 5 Watts, 544; Bosley v. Porter, 4 J. J.

Marsh. 621; Libby v. Hopkins, Sup. Ct. U. S. 1882; 25 A. L. J. 153; U. S. v. Eckford, 17 Pet. 251; Blackstone Bank v. Hill, 10 Pick. 129; Rosseau v. Cull, 14 Vt. 83; Selleck v. Turnpike Co., 13 Conn. 453; Adams Ex. Co. v. Black, 62 Ind. 128. That the intent of the debtor may be inferred from extrinsic facts, see Waters v. Tompkins, 2 Cr. M. & R. 723; Starrett v. Barber, 20 Me. 457; Robinson v. Doolittle, 12 Vt. 246; Gwinn v. Whitaker, 1 Har. & J. 754; Dorsey v. Gassaway, 2 Har. & J. 402; Lindsey v. Stevens, 5 Dana, 104; see Ramsom v. Thomas, 10 Ired. 165.

³ Burn v. Boulton, 2 C. B. 476; West Branch Bank v. Moorhead, 5 W. & S. 542; Scott v. Fisher, 4 T. B. Monroe, 387; see Stone v. Seymours, 15 Wend. 19; and cases *infra*, § 934; but see, *contra*, Field v. Holland, 6 Cranch, 8.

⁴ Wittkowsky v. Reid, 182 N. C. 116. But see Brice v. Hamilton, 12 S. C. 32.

⁵ Gordon, J., Guthrie's Ap., 92 Penn. St. 272, citing Beans v. Bullitt, 57 Penn. St. 221.

as the amount of one of several debts, the presumption is that it was intended to pay that debt.¹—A debtor who owes both individually and as executor in distinct debts is supposed, all other things being equal, to intend to pay his own debt.² And when he pays out of partnership funds, the inference is it is to a partnership debt.³—When, upon the death of a partner, the surviving partners continue to deal with a particular creditor, and payments are made him by the surviving partners on a continuous account, the payment is to be appropriated to the partnership debts.⁴—But the circumstance that the debtor sent the money through a party who was his security for one of several debts he owed the payee, is not sufficient ground to infer that the payment was meant by the debtor to go to the debt thus secured.⁵

§ 925. When a creditor holds several claims against an insolvent debtor, and when a specific sum is sent to him on account of these debts, the object being to effect a composition for debts, there must be equality of appropriation, and the creditor cannot apply the money to the reduction of debts for which he holds security, leaving others unreduced.⁶—Where a surety has paid the debt in full, the creditor “will be trustee for him as to the claim to the composition upon that debt.”⁷ The same rule applies with dividends in bankruptcy; they are appropriated ratably in payment of all the debts.⁸

Insolvent
distribu-
tion must
be equal.

§ 926. The right of appropriation cannot be exercised by any but debtor and creditor. No third party can be heard

¹ *Marryatts v. White*, 2 Stark. 102; *Williams v. Rawlinson*, 3 Bing. 71; 2 and see *Shaw v. Pieton*, 4 B. & C. 715; *Parsons*, 633; citing *Smith v. Wigley*, *Kirby v. Marlborough*, 2 M. & S. 18; 3 *Moore & S.* 174; *Livermore v. Rand*, 6 *Fost.* 85.
Roberts v. Garnie, 3 *Caines*, 14; see *Tayloe v. Sandiford*, 7 *Wheat.* 14; *Stone v. Seymour*, 15 *Wend.* 19; *Mitchell v. Dall*, 2 H. & Gill, 160; *Scott v. Fisher*, 4 T. B. Mon. 387.

² *Goddard v. Cox*, 2 *Strange*, 1194; *Sawyer v. Tappan*, 14 N. H. 352; *Fowke v. Bowie*, 4 Har. & J. 566.

³ *Thompson v. Brown*, M. & M. 40.

⁴ *Simson v. Ingham*, 2 B. & C. 65; *Todd*, 8 A. & E. 846.

⁵ *Mitchell v. Dall*, 4 Gill & J. 361.

⁶ *Bardwell v. Lydall*, 7 Bing. 489; *Thompson v. Hudson*, L. R. 6 Ch. 320; see *Merrimack Bk. v. Brown*, 12 N. H. 320; *Com. Bk. v. Cunningham*, 24 Pick. 270.

⁷ *Paley v. Field*, 12 Ves. 435.

⁸ *Leake*, 2d ed. 916, citing *Raikes v.*

for the purpose of compelling any specific appropriations.¹

Right is one which third parties cannot exercise. And a surety cannot compel such an application of payments by the creditor as would most relieve him.² If, however, such may be inferred to be the intention

of the debtor, the payment will be appropriated to relieve the surety.³

§ 927. If the debtor does not expressly appropriate, and if there are no circumstances from which an implied appropriation on his part may be inferred, the right of designation, according to the weight of authority in England and the United States, is with the creditor. Hence, if there be no designation by the debtor, express or implied, no matter what may be the grade of the debt, the creditor may select it for payment, in preference to other debts of higher sanction. Thus he may prefer a simple contract debt to a specialty.⁴ If the debtor's intent is ascertainable, however, that of the creditor must yield.⁵ And where a creditor holds two claims against a debtor who pays in money without designation, one of those claims being on the creditor's individual account, and the other on his account as trustee, the creditor cannot absorb the payment in his own debt, to the exclusion of the debt due his *cestui que trust*.⁶

¹ *Gordon v. Hobart*, 2 Story, 264.

² *Wright v. Hickling*, L. R. 2 C. P. 199; see *Plomer v. Long*, 1 Stark. 122.

³ *Marryatts v. White*, 2 Stark. 101; but see *Postmaster-General v. Norvell*, Gilpin, 106.

⁴ *Infra*, §§ 930 *et seq.*; *Peters v. Anderson*, 5 Taunt. 596; *Bosangust v. Wray*, 6 Taunt. 597; *Cremer v. Higginson*, 1 Mason, 338; *Commonwealth Nat. Bank v. Mech. Nat. Bank*, 94 U. S. 437; *Mayor of Alexandria v. Patton*, 4 Cranch, 317; *Franklin Bank v. Cooper*, 36 Me. 222; *Pierce v. Knight*, 31 Vt. 701; *Harding v. Tefft*, 75 N. Y. 461; *Smuller v. Union Canal Co.*, 37 Penn. St. 68; *Lewis v. Pease*, 85 Ill.

35; *Davis Sewing Machine v. Buchlis*, 89 Ill. 237; *Hamilton v. Benbury*, 2 Hayw. 385; *Brice v. Hamilton*, 12 S. C. 32; *Hargroves v. Cooke*, 15 Ga. 321; *Allen v. Mining Co.*, 73 Mo. 688; *Trullinger v. Kofoed*, 7 Oregon, 228; see other cases cited *infra*.

⁵ *Supra*, § 924; *Reed v. Boardman*, 20 Pick. 441.

⁶ *Cole v. Trull*, 9 Pick. 325; *Scott v. Ray*, 18 Pick. 361; see *Mahaiwe Bank v. Peck*, 127 Mass. 298. That a creditor may appropriate by our law at his election, in all cases where the debtor does not appropriate, see *infra*, § 929; and see *Harding v. Wormley*, 8 Baxt. 578; *Hyatt v. Clements*, 65 Ind. 12.

§ 928. A debtor who makes a payment to a creditor to whom he owes several debts, has the right, according to the Roman law, to determine the debt to which the payment is to be appropriated. If he omits to do this, the tests are as follows: (1) The most pressing debt is to be first paid. (2) If all the debts are equally pressing, the oldest has the preference. (3) If all are of the same date, then there is to be an equal apportionment. The reasoning is that a debtor who leaves it to the creditor under such circumstances, creates thereby an agency, and the creditor is bound in such matters by the ordinary rules of agency, and must adopt the mode of appropriation that would be most beneficial to the debtor. Hence, by this view, when the payment is made on account of principal and interest, the appropriation goes first to interest and then to principal.¹ The German code takes another view of this vexed question, rejecting the theory that the creditor in such cases is to act as the debtor's agent, and making the creditor's interest the test. If, therefore, there is no designation by the debtor, the payment is to be appropriated as follows: (1) The debt first called in to be first paid. (2) If all are of the same date, then the debt which has the least security is to be first paid. (3) If all stand in this respect on the same footing, then that bearing the highest interest is to be first extinguished. (4) If all are in this respect alike, then the oldest has priority. (5) If these tests all fail, then the debts are to be paid *pari passu*.² The Austrian code, on the other hand, follows the Roman law as above given.³

By Roman law creditor is regarded as the debtor's agent in appropriation.

¹ L. 1-8, D. h. t.; L. 1, C. h. t.; L. 48, 94, § 3; L. 97, 103, D. h. t. Several learned treatises have been published on this topic: Mittag, specimen de solutione, quae fit ab eo, qui ex pluribus causis debitor alterius existit. 1795. Gmelin, diss. de gravior causa, in quam a debitore ex pluribus causis solutio facta praesumitur. Tub. 1801. See Story's Eq. Jur. 12th Am. ed. § 459 a; Poth. Pand. Lib. 46, tit. 43, art. 1. An analysis of the positions of Pothier will be found in Story, *ut supra*.

² Koch, § 155.

³ The Roman law is thus correctly stated by Tindal, C. J.: "In the absence of any express declaration by either, the inquiry was what application would be most beneficial to the debtor." Clayton's case, 1 Mer. 606. An exposition of the Roman law will be found in the Am. Law Mag. for April, 1843, and in Pattison v. Hull, 9 Cow. 773 *et seq.*; see, also, 1 Am. Lead. Cas. 123 *et seq.*

§ 929. The English rule is that when there is no designation by the debtor, the creditor, as we have seen, has the right of appropriation. "According to the law of England, the debtor," it is said by Tindal, C. J., "may, in the first instance, appropriate the payment, *solvitur in modum solventis*; if he omit to do so, the creditor may make the appropriation, *recipitur in modum recipientis*."¹ He may appropriate the payment, therefore, in the way most favorable to himself and least favorable to his debtor.² If he has a security for several debts, he may appropriate the proceeds to any one of the debts he may desire first to extinguish.³ But funds arising from a security for a particular debt, must be appropriated to pay that debt.⁴ On the other hand, where the debts consisted in a mortgage and a book account, it was held that an undesignated payment should be given to the mortgage, as most conducive to the interests of the debtor;⁵ and on the same principle undesignated payments will be applied to debts bearing interest in preference to debts not bearing interest.⁶

§ 930. A creditor, also, under the English system, may appropriate a payment to a claim not recoverable by action, provided there is a sufficient consideration to support the claim.⁷ Even a debt barred by the

Creditor may appropriate to

¹ Mills v. Fowkes, 5 Bing. N. C. 461; see Clayton's case, 1 Mer. 605.

² Leake, 2d ed. 918; Benj. on Sales, 3d Am. ed. § 748; Peters v. Anderson, 5 Taunt. 596; Bosanquet v. Wray, 6 Taunt. 597; Goddard v. Hodges, 1 C. & M. 33; Kirby v. Marlborough, 2 M. & S. 18; Cremer v. Higginson, 1 Mason, 338; Com. Nat. Bk. v. Mech. Nat. Bk., 94 U. S. 437; Shipsey v. Bowery Bk., 59 N. Y. 485; Harding v. Tift, 75 N. Y. 461; Smuller v. Union Canal Co., 37 Penn. St. 68; Lewis v. Pease, 85 Ill. 35; Davis Sewing Machine v. Buckles, 89 Ill. 237; Jones v. Kilgore, 2 Rich. Eq. 64; Caxwell v. De Vaughan, 55 Ga. 643; see Upham v. Lefavour, 11 Met. 184.

³ Dickinson ex parte, L. R. 20 Eq. 767;

Harding v. Tift, 75 N. Y. 461. See Ramsay v. Warner, 97 Mass. 8, 13, 14, for discussion of this topic by Hoar, J., and see Field v. Holland, 6 Cranch, 8.

⁴ Stoveld v. Eade, 4 Bing. 154; Pattison v. Hall, 9 Cow. 747; Sanders v. Knox, 57 Ala. 80; and see cases *supra*, § 924. That the creditor's interest is the test, see further Field v. Holland, 6 Cranch, 8; Briggs v. Williams, 2 Vt. 283; Capen v. Alden, 5 Met. 268.

⁵ Pattison v. Hull, 9 Cow. 747.

⁶ McTavish v. Carroll, 1 Md. Ch. 160; Bussey v. Gant, 10 Humph. 238; and see Ch. on Cont. 11th Am. ed. 1114, citing further Briggs v. Williams, 2 Vt. 286; Dows v. Morewood, 10 Barb. 183.

⁷ Leake, 2d ed. 919; Benj. on Sales, 3d Am. ed. § 748; Arnold v. Poole, 4

statute of limitation may be thus paid.¹ The creditor may also appropriate to a debt which is not recoverable under the statute of frauds,² or for which, by local law, no suit can be brought; *e. g.*, debts to which local penalties are attached.³ But the creditor cannot apply a payment to a debt in itself illegal, as "a claim for usurious interest, a charge for articles sold contrary to law, and the like."⁴ Nor can he appropriate to an unfounded claim for which there is no legal or equitable consideration.⁵—Where there are two classes of claims, one legal and the other illegal, a payment not specially designated will be appropriated to the discharge of the legal debt,⁶ and there can be no appropriation by the creditor to a debt which is for a consideration explicitly prohibited by the *lex fori*.⁷—An appropriation by the creditor so as to extinguish part of a debt barred by the statute of limitations, does not take the remainder of the debt out of the statute.⁸

M. & G. 860; Philpott v. Jones, 2 A. & E. 41; Owens v. Denton, 1 C. M. & R. 712.

¹ Mills v. Fowkes, 5 Bing. N. C. 455; Waugh v. Cope, 6 M. & W. 824; Ashby v. James, 11 M. & W. 542; Jackson v. Barker, 1 Dill. 311; Murphy v. Webber, 61 Me. 478; Brown v. Burnes, 67 Me. 535; Bancroft v. Dumas, 21 Vt. 456; and cases cited *infra*, § 933; Pond v. Williams, 1 Gray, 630; Ramsay v. Warner, 97 Mass. 8; but see Burn v. Boulton, 2 C. B. 476; Wood v. Wylds, 6 Eng. Ark. 754; Moniteau Bk. v. Miller, 73 Mo. 187.

² Haynes v. Nice, 100 Mass. 327.

³ Dawson v. Remnant, 6 Esp. 24, which Mr. Benj. (Sales, 3d Am. ed. § 788) tells us is approved in Laycock v. Pickles, 4 B. & S. 507; Philpott v. Jones, 2 Ad. & E. 41; Crookshank v. Rose, 5 C. & P. 19.

⁴ Story Eq. Jur. 12th ed. § 4596; citing Caldwell v. Wentworth, 14 N. H. 431; Ayer v. Hawkins, 19 Vt. 26; Bancroft v. Dumas, 21 Vt. 456; Rohan

v. Hanson, 11 Cush. 44; Parchman v. M'Kinney, 12 Sm. & M. 631.

⁵ Leake, 2d ed. 920; Benj. on Sales, 3d Am. ed. § 749; Nash v. Hodgson, 6 D. M. & G. 474; Lamprell v. Billericay Union, 3 Ex. 283; James v. Child, 2 Cr. & J. 678; West Branch Bk. v. Moorehead, 5 W. & S. 542; Quigley v. Duffey, 52 Iowa, 610; Scheffer v. Tozier, 25 Minn. 478.

⁶ Benj. on Sales, 3d Am. ed. § 748; Wright v. Laing, 3 B. & C. 165; Caldwell v. Wentworth, 14 N. H. 431; Kidder v. Norris, 18 N. H. 532; Bancroft v. Dumas, 21 Vt. 456; Rohan v. Hanson, 11 Cush. 44; Warren v. Chapman, 105 Mass. 87; Huffstater v. Hayes, 64 Barb. 573; Albert v. Lindau, 46 Md. 334.

⁷ Starkey v. Gabby, 1 Cr. & Dix, 248; Phillips v. Moses, 65 Me. 70; Caldwell v. Wentworth, 14 N. H. 431; Bancroft v. Dumas, 21 Vt. 456; Rohan v. Hanson, 11 Cush. 44; Ramsay v. Warner, 97 Mass. 8; Warren v. Chapman, 105 Mass. 87.

⁸ Nash v. Hodgson, 6 M. & G. 474;

§ 931. When a payment is made, without designation, it will be applied to a debt which is due, in preference to one not yet matured.¹ A debt absolutely due will also be paid in preference to a debt due contingently.²

§ 932. The creditor is entitled to reserve his election until it is necessary for him to render an account to the debtor, or until he is otherwise called upon to report his action.³ Whether and when an election takes place, is to be inferred, in absence of direct statement by him, from all the circumstances of the case.⁴ He is not precluded by a mere private entry on his books, not

Ramsay v. Warner, 97 Mass. 8. In Ramsay v. Warner, 97 Mass. 13, 14, Hoar, J., said: "The debtor is not presumed to have intended to renew a promise which is no longer legally binding upon him, although he has put it into his creditor's power to satisfy *pro tanto* a claim upon which he has lost his legal remedy. But when there are several ascertained and admitted debts, none of which are barred by the statute, and a payment is made without an application of it by the debtor, we think a different rule applies, and that the payment, when applied by the creditor, has all the effect upon the debt to which it is applied that it would have if it had been made by the debtor expressly on account of it. This distinction between debts barred by the statute at the time when the payment is made, and those not then barred, was expressly recognized in Pond v. Williams, 1 Gray, 630. See Nash v. Hodgson, 6 De G. M. & G. 474; Ayer v. Haskins, 19 Vt. 26; Bancroft v. Dumas, 21 Vt. 456; Armistead v. Brooks, 18 Ark. 521; Burr v. Burr, 36 Penn. St. 284.—*The debtor must be held to intend the full effect of a payment upon whatever debt the creditor may elect to apply it.*"

¹ Benj. on Sales, 3d Am. ed. § 747, note n'; McDowell v. Blackstone Canal, 5 Mason, 11; Caldwell v. Wentworth, 14 N. H. 431; Baker v. Stackpoole, 9 Cow. 420; Stone v. Seymour, 15 Wend. 19; Seymour v. Sexton, 10 Watts, 255; Law v. Sutherland, 5 Grat. 357; Bacon v. Brown, 1 Bibb, 334; Bobe v. Stickney, 36 Ala. 482; see Hunter v. Osterhoudt, 11 Barb. 33.

² Portland Bank v. Brown, 22 Me. 295; Niagara Bk. v. Rosevelt, 9 Cow. 409.

³ Simson v. Ingham, 2 B. & C. 65; 3 D. & R. 249; Seymour v. Marvin, 11 Barb. 80; Dorsey v. Wayman, 6 Gill, 59; cited Benj. on Sales, 3 Am. ed. § 749; and see Emery v. Tichout, 13 Vt. 15; Stamford Bk. v. Benedict, 15 Conn. 438; Smith v. Lloyd, 11 Leigh, 517; Heilbron v. Bissell, 1 Bailey Eq. 435.

⁴ Shaw v. Picton, 4 B. & C. 715; S. C., 7 D. & R. 201; Frazer v. Bunn, 8 C. & P. 704; Williams v. Griffith, 5 M. & W. 300; Starrett v. Barber, 20 Me. 457; Seymour v. Van Slyck, 8 Wend. 403; Allen v. Culver, 3 Denio, 284; Heilbron v. Bissell, 1 Bailey Eq. 430; Brady v. Hill, 1 Mo. 315.

communicated to the debtor, from appropriating as he thinks best.¹ So far as concerns third parties, he must make the election in a reasonable time, but so far as concerns the debtor he may hold back the election until called upon by the debtor to act.² But when once the application is communicated to the debtor, it cannot be recalled.³ On the other hand, a debtor who receives without objection an account current from his creditor appropriating payments to less onerous debts ratifies by his silence the appropriation so made.⁴—The debtor's right of designation cannot be defeated by the creditor appropriating the money before the debtor has had the opportunity of exercising his discretion.⁵

§ 933. According to Sir W. Grant, "there is no room [in accounts] for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account; presumably it is the sum first paid in that is first drawn out; it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts are settled, and particularly cash accounts."⁶ Even when payments are made on a banker's account, deposits against drafts, the items paid in go to balance those paid out, though some of the items paid in turn out to be trust moneys.⁷ This view has been accepted in the United States.⁸ This, however,

In accounts when there is no designation, first debt is to be paid.

¹ *Simson v. Ingham*, *ut supra*; *Seymour v. Marvin*, 11 Barb. 80; *Dorsey v. Wagman*, 6 Gill, 59.

² *Bosanquet v. Wray*, 6 Taunt. 597; *Mayor, etc. v. Patten*, 4 Cranch, 317.

³ See cases cited *supra*, *Hilton v. Burley*, 2 N. H. 193; *Seymour v. Marvin*, 11 Barb. 80; *McMaster v. Merrick*, 41 Mich. 505; see generally *Portland Bk. v. Brown*, 22 Me. 295; *Emery v. Tick-out*, 13 Vt. 15; *Stamford Bk. v. Benedict*, 15 Conn. 438.

⁴ *McLear v. Hunsicker*, 30 La. An. Pt. II. 1225.

⁵ *Waller v. Lacy*, 1 M. & G. 54.

⁶ *Clayton's case*, 1 Mer. 608; adopted *Leake*, 2d ed. 917; *Benj. on Sales*, 3d Am. ed. § 748; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Williams v. Griffith*, 5 M. & W. 300; *Brown v. Adams*, L. R. 4 Ch. 764; *Thompson v. Hudson*, L. R. 6 Ch. Ap. 320; *Simson v. Cooke*, 1 Bing. 452; *Bloom v. Kern*, 30 La. An. Part II. 1263. See *Cabada v. De Jongh*, 10 Phila. 422.

⁷ *Brown v. Adams*, L. R. 4 Ch. 764.

⁸ 1 *Chitty on Cont.* 11th Am. ed. 1116; *Benj. on Sales*, 3d Am. ed. § 748; *Story Eq. Jur.* 12th ed. § 459 *b*; *Story on Cont.* § 1154; *U. S. v. Wardwell*, 5

is on the supposition that there is no specific designation by either debtor or creditor.¹ Nor does the fact that the earlier debts are barred by the statute of limitations preclude the application of items in a general account to such earlier debts.² But the presumption of appropriation in order of date may be overcome by proof of an understanding to the contrary, which understanding may be inferred from all the facts.³ The presumption, however, is not rebutted by proof that the earlier items are for goods sold on condition that they are not to become the property of the purchaser till paid for, although the seller made a memorandum of this condition in the book in which the account was entered.⁴—When some of the makers of a joint and several note make payment of their shares of the principal and interest due from them at the date of pay-

Mason, 82; U. S. *v.* Kirkpatrick, 9 Wheat. 720; Jones *v.* U. S., 7 How. 681; Gass *v.* Stinson, 3 Sumn. 99; Miliken *v.* Tufts, 31 Me. 497; Caldwell *v.* Wentworth, 14 N. H. 431; Upham *v.* Lefavour, 11 Met. 184; Crompton *v.* Pratt, 105 Mass. 255; Fairchild *v.* Holby, 10 Conn. 175; Jackson *v.* Johnson, 74 N. Y. 607; Truscott *v.* King, 2 Seld. 147; Germ. Luth. Ch. *v.* Heise, 44 Md. 453; Sprague *v.* Hazenwinkle, 53 Ill. 419; Hill *v.* Robbins, 22 Mich. 475; Smith *v.* Lloyd, 11 Leigh, 518; Price *v.* Dowdy, 34 Ark. 285; and see generally *Postmaster-General v. Furber*, 4 Mason, 336; *McKenzie v. Nevius*, 22 Me. 138; *Miller v. Miller*, 23 Me. 24; *Dows v. Morewood*, 10 Barb. 183; *Baker v. Stackpoole*, 9 Cow. 435.

¹ *Supra*, § 923. In *Field v. Holland*, 6 Cranch, 8, it was held that the most precarious security should be paid first. This, however, is inconsistent with the general current of authority.

When a firm changes its membership, but continues to deal with a particular creditor whose claims continue to run on unextinguished, payments made by the firm, as reconstituted, go

on this principle, to extinguish debts due by the original firm. *Bodenham v. Purchas*, 2 B. & Ald. 39; *Hooper v. Keay*, L. R. 1 Q. B. D. 178.

² *Williams v. Griffith*, 5 M. & W. 300; *Ashby v. James*, 11 M. & W. 542; and cases cited *supra*, § 930.

³ *Leake*, 2d ed. 917; *Benj. on Sales*, 3d Am. ed. § 748; *Henniker v. Wigg*, 4 Q. B. 792; *Boys in re*, L. R. 10 Eq. 467; *City Discount Co. v. McLean*, L. R. 9 C. P. 692.

⁴ *Crompton v. Pratt*, 105 Mass. 255. "The money paid beyond lawful interest on account of a debt is in legal effect a payment upon the debt. In this case the fact was well stated as constituting payment, and the objection to relief on that account cannot be sustained. Each debt was a continuous thing, and the last notes given in renewal of each debt repaid only what was justly remaining due upon that debt. *Upham v. Brimhall*, 11 Met. 526; *Auburn Bank v. Lewis*, 75 N. Y. 516; *Hiatt v. Griswold*, 5 Fed. Rep. 573." *Wheeler, J., Loveridge v. Larned*, U. S. Cir. Ct. N. Y. 1881, 12 Rep. 324.

ment, the payment is to be applied to the *pro rata* payment of principal as well as of interest due by the parties so paying.¹

§ 934. Where there is no running account, and no designation by either debtor or creditor, then, according to Judge Story, "if there are various debts due to the creditor, the court will make the application according to its own view of the law and equity of the case."² If we take the theory of the Roman law, that the creditor in such cases acts as the agent of the debtor, then we would appropriate the payment in such a way as to best promote the interests of a debtor. If we are obliged to reject this view, then, in default of designation on either side, the court must appropriate in such a way as best to carry out their common intention as developed in the transactions between them.³ Hence, as we have already seen, a mortgage-debt will be paid in preference to a book-account debt;⁴ and interest will be extinguished before principal is reduced.⁵—Where an agent who has mingled his principal's accounts with his own, receives a remittance from a debtor to both, it has been held that it should be divided *pro rata* between the two;⁶ though the better view would be that where the agent is in the wrong in mingling the accounts, the whole payment should go to the principal.⁷

In other cases the law divides equitably.

II. PARTIAL PAYMENT.

§ 935. A receipt of part of a debt operates only to discharge the debt *pro tanto*, and does not, without an agree- Receipt for

¹ Donaldson v. Cothran, 60 Ga. 603.

² Gordon v. Hobart, 2 Story, 264.

³ U. S. v. January, 7 Cranch, 572; U. S. v. Wardwell, 5 Mason, 85; Gass v. Stinson, 3 Sumner, 98; U. S. v. Kirkpatrick, 9 Wheat. 720; U. S. v. Eckford, 17 Pet. 251; 1 How. 250; Pattison v. Hull, 9 Cow. 747; Seymour v. Van Slyck, 8 Wend. 403; Smith v. Lloyd, 11 Leigh, 512; McCauley v. Holtz, 62 Ind. 205; Applegate v. Koons, 74 Ind. 247; Callahan v. Boazman, 21 Ala. 246; see Mahaiwe Bk. v.

Peck, 127 Mass. 298; Williams v.

Vance, 9 S. C. 344.

⁴ Pattison v. Hull, 9 Cow. 747; cited *supra*, § 929.

⁵ Story v. Livingston, 13 Pet. 360; Dean v. Williams, 17 Mass. 417; People v. New York, 5 Cow. 331; Spires v. Hamot, 8 W. & S. 17; and cases cited 2 Ch. on Cont. 11th Am. ed. 1114.

⁶ Barrett v. Lewis, 2 Pick. 123; Cole v. Trull, 9 Pick. 325; Scott v. Ray, 18 Pick. 361.

⁷ Wh. on Ag. §§ 231, 523.

less sum may extinguish debt, if there be distinctive consideration.

ment on a distinctive consideration, extinguish the remainder of the debt.¹ But if there be a distinctive consideration for the release of the residue, it operates as an extinguishment.² This has been held to

be the case where the fractional payment is made as part of a general composition by which there is to be a general release by creditors in consideration of an assignment of the debtor's entire property;³ where specific property is assigned which the creditor could not otherwise have reached;⁴ where a third party agrees to supply security for the fractional payment on condition of the release or make such payment in cash;⁵ where the payment is anticipated and a discount is taken off for this reason;⁶ where the payment is part of a compromise of litigation;⁷ where the payment is of a negotiable security which gives the creditor some special advantage;⁸ and where the payment is part of an arrangement with other joint debtors.⁹ Proof of payment of a part, also, may lead, with other circumstances, to the inference of the payment of the whole.¹⁰—After suit is brought, payment of the debt with-

¹ *Supra*, § 504; *infra*, §§ 996 *et seq.*, Leake, 2d. ed. 888; Cumber *v.* Wane, 1 Strange, 426; 1 Smith, L. C. 7th Am. ed. 595; Fitch *v.* Sutton, 5 East, 230; Down *v.* Hatcher, 10 A. & E. 121; Mitchell *v.* Cragg, 10 M. & W. 367; Bailey *v.* Day, 26 Me. 88; Blanchard *v.* Noyes, 3 N. H. 518; Wheeler *v.* Wheeler, 11 Vt. 60; Warren *v.* Skinner, 20 Conn. 559; Harriman *v.* Harriman, 12 Gray, 341; Seymour *v.* Minturn, 17 Johns. 169; Carraway *v.* Odeneal, 56 Miss. 223; Cavaness *v.* Ross, 33 Ark. 572. As to creating a new obligation, see *supra*, § 852.

² *Infra*, §§ 996 *et seq.*; see Cooper *v.* Parker, 15 C. B. 822; Hinekley *v.* Arey, 27 Me. 362; Milliken *v.* Brown, 1 Rawle, 391; see for authorities and other distinctions, *supra*, § 504. That this takes place in novation, see *supra*, §§ 852 *et seq.*

³ Steinman *v.* Magnus, 11 East. 390; Evans *v.* Powis, 1 Ex. 601; and cases cited *infra*, §§ 996 *et seq.*

⁴ Eaton *v.* Lincoln, 13 Mass. 424; *infra*, § 1001.

⁵ Welby *v.* Drake, 1 C. & P. 557; Henderson *v.* Stobart, 5 Ex. 99; and cases cited *supra*, § 504; and *infra*, §§ 1001-3.

⁶ *Supra*, § 504; Leake, 2d ed. 888; citing Pinnel's case, 5 Co. 117 *a*; and see Smith *v.* Brown, 3 Hawks, 580; and cases cited § 504; and *infra*, §§ 1000 *et seq.*

⁷ *Supra*, § 504; Tayler *v.* Manners, L. R. 1 Ch. 48; Keen *v.* Vaughan, 48 Penn. St. 477; and see cases cited *supra*, §§ 198, 533.

⁸ *Supra*, § 504; Sibree *v.* Tripp, 15 M. & W. 23; Lichfield *v.* Green, 1 H. & N. 854; and cases cited *infra*, §§ 954, 1003; Goddard *v.* O'Brien, 46 L. T. N. S. 306.

⁹ Milliken *v.* Brown, 1 Rawle, 391; *supra*, § 527.

¹⁰ Henderson *v.* Moore, 5 Cranch, 11.

out the costs does not relieve the debtor from liability for the costs.¹ It is otherwise when suit has not yet been brought.²

§ 936. A plaintiff, by electing to take judgment for part of his claim, may absorb the whole claim in the judgment. "The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward."³—"There is nothing in this language applied to the facts in the case, however," so it has been declared by high authority in this country, "which gives support to the doctrine that whenever, in one action, a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is in a subsequent suit between the same parties, *upon a different cause of action*, precluded from availing himself of such ground."⁴ But a creditor who arbitrarily splits up any one cause of action into separate suits exhausts his remedy by suing the first suit to judgment.⁵

Plaintiff by suing part of claim to judgment may extinguish whole.

§ 937. No matter how great may be the amount claimed in a suit for unliquidated damages, it may be extinguished by a comparatively small sum paid in cash. The cash element in the payment forms the consideration; money paid in hand having a real value which is a counterpoise for an unliquidated claim for a far larger amount.⁶

Fractional cash payment may extinguish larger unliquidated claim.

¹ Goodwin v. Cremer, 18 Q. B. 757; Stevens v. Briggs, 14 Vt. 44; Emerson v. White, 10 Gray, 351; and cases cited *infra*, §§ 970 *et seq.*

² Beaumont v. Greathead, 3 D. & L. P. C. 631.

³ Henderson v. Henderson, 3 Hare, 115; Wigram, V.-C.; see Chamley v. Lord Dunsany, 2 Sch. & L. 718; and see *infra*, § 1007.

⁴ Field, J., Cromwell v. Sac, 94 U. S. 351; see Aurora City v. West, 7 Wall. 82; Howard v. Kimball, 65 Me. 308.

⁵ Wh. on Ev. § 788; Baker v. Stinchfield, 57 Me. 363; Warren v. Comings, 6 Cush. 103; Smith v. Jones, 15 Johns. R. 229; Willard v. Sperry, 16 Johns. R. 121; Miller v. Covert, 1 Wend. 487; Ingraham v. Hall, 11 S. & R. 78; Nave v. Wilson, 33 Ind. 294; Buford v. Kersey, 48 Miss. 643; Wickersham v. Whedon, 33 Mo. 561; and see *infra*, § 1007.

⁶ Wilkinson v. Byers, 1 A. & E. 106. For other cases see *supra*, §§ 521 a, 533, 858; *infra*, § 1000.

III. RECEIPTS.

§ 938. A receipt, though written, is open to parol explanation; and the party by whom it was signed may show, as against the other party, that it was made by mistake, or does not exhibit the real state of facts.¹ The same rule exists in equity.² Nor is the rule limited to informal receipts. It applies to bankers' pass-books;³ to certificates of deposit;⁴ and to receipts of public officers.⁵—At common law, it should be remembered, a receipt under seal concludes the party making it, although in equity it may be explained or set aside on ground of mistake or fraud.⁶—Parol evidence, also, is admissible to show that a warranty is incidental to an informal written receipt or to a bill of parcels.⁷—Whether a receipt for a recent charge leads to the inference of an extinguishment of prior claims depends upon all the circumstances of the case. Such an inference may be drawn *prima facie* from the mere fact of the receipt of the later charge, but it is open to rebuttal.⁸—Possession of the document, also, by which the debt is expressed leads to an inference of payment.⁹ Payment may also be inferred in cases where an employee, who was in the prior habit of coming regularly for his wages, left his employment without com-

¹ Wh. on Ev. § 1064; *Graves v. Key*, 3 B. & Ad. 318; *Foster v. Dawber*, 6 Ex. 848; *Edwards v. Hancher*, L. R. 1 C. P. D. 111; *Good ex parte*, L. R. 5 C. D. 46; *Richardson v. Beede*, 43 Me. 161; *Nelson v. Weeks*, 111 Mass. 223; *Grinnell v. Spink*, 128 Mass. 25; *Foster v. Newbrough*, 58 N. Y. 481; *Middlesex v. Thomas*, 20 N. J. Eq. 39; *Russell v. Church*, 65 Penn. St. 9; *Walker v. Christian*, 21 Grat. 291; *Ditch v. Vollhardt*, 82 Ill. 134; *Wilson v. Derr*, 69 N. C. 137.

² *Lee v. R. R.*, 6 Ch. 534.

³ *Com. Bk. v. Rhine*, 3 Macq. Sc. 64.

⁴ *Hotchkiss v. Mosher*, 48 N. Y. 478.

⁵ *Lewis v. Webber*, 116 Mass. 450.

⁶ *Baker v. Dewey*, 1 B. & C. 704.

deed does not estop, but may be disputed between the parties, see *Lampon v. Corke*, 5 B. & Ald. 606.

⁷ *Benj. on Sales*, 3d Am. ed. § 622; *Allen v. Pink*, 4 M. & W. 140; *Bradford v. Manly*, 13 Mass. 137; *Stacy v. Kemp*, 97 Mass. 168; *Foot v. Bentley*, 44 N. Y. 166; *Perrine v. Cooley*, 10 Vroom, 449.

⁸ Wh. on Ev. § 1362; *Colsell v. Budd*, 1 Camp. 27; *Hodgen v. Wight*, 36 Me. 326; *Attleborough v. Middleborough*, 10 Pick. 378; *Crompton v. Pratt*, 105 Mass. 255; *Walton v. Eldridge*, 1 Allen, 203; *Deeker v. Livingston*, 15 Johns. 479.

⁹ See Wh. on Ev. § 1362, and authorities there cited.

That a receipt of purchase-money in a

plaint of non-payment, and made no suggestion that he had not been fully paid until several years had elapsed.¹

§ 939. While receipts may be explained or disputed between the parties, they may estop as to third parties.² As an illustration of this may be noticed receipts for purchase money which may bind the party receipting as to purchasers without notice, and yet be open to explanation between the parties.³ Between the insured and underwriter, also, a receipt by a broker, acting as agent of the underwriter, may be conclusive, and yet may be open to correction between the broker and the underwriter.⁴ A receipt by a public officer may be in like manner an estoppel as against vendees with notice.⁵

Receipts may estop as to third parties.

§ 940. When two persons sign a receipt jointly, it is admissible for one of them to show that he acted merely as surety, and that the money was exclusively received by the other party.⁶ One of several trustees, also, who have signed a joint receipt, may show that the money was received by his fellow trustees, and that he himself signed under circumstances which relieve him from liability.⁷ And where one of several trustees receipts for a debt due to the trust, his co-trustees may show that the receipt was in fraud of their rights.⁸

One of several joint receivers may show that the money was received by his associates.

§ 941. The law with regard to releases is hereafter distinctively discussed. It is enough at this place to say that to enable a release to operate as discharging a claim, it must be either under seal, or must have a sufficient consideration.⁹

Releases must be under seal or must have sufficient consideration.

¹ *Lucas v. Novosilieski*, 1 Esp. 296; *Sellen v. Norman*, 4 C. & P. 81.

² Wh. on Ev. § 1006; *Wyath v. Hertford*, 3 East, 147; *Jenkins v. Power*, 6 M. & S. 287.

³ Wh. on Ev. § 1066; *Bigelow on Est.* 3d ed. 473-5; *Leake*, 2d ed. 905; *Kennedy v. Green*, 3 M. & K. 699; *Hunter v. Walters*, L. R. 7 Ch. 75; *Curtis v. Wakefield*, 15 Pick. 437; *Graves v. Dudley*, 20 N. Y. 76.

⁴ *Jenkins v. Power*, 6 M. & S. 287; *Power v. Butcher*, 10 B. & C. 329.

⁵ *Halsey v. Blood*, 29 Penn. St. 319.

⁶ *Straton v. Rasball*, 2 T. R. 366.

⁷ *Westley v. Clark*, 1 Eden, 357; *Brice v. Stokes*, 11 Ves. 319.

⁸ *Skaife v. Jackson*, 3 B. & C. 421; *Farrar v. Hutchinson*, 9 A. & E. 641; and see *Leake*, 2d ed. 902, where the above examples are given.

⁹ See *infra*, §§ 1031 *et seq.*

IV. PAYMENT BY AND TO AGENTS, EXECUTORS, TRUSTEES, AND
JOINT DEBTORS.

§ 942. A payment by a third party on behalf of a debtor, though without authority at the time, discharges the debt when afterward adopted by the debtor, but, by the old authorities, not till then.¹ But before ratification by the debtor the payment made by a third party in the debtor's behalf may be recalled, and the money received back, without the debtor's consent.² In England the prevalent view continues to be that a payment by a stranger of a debt without the privity of the debtor does not discharge the debt;³ though this has been questioned, and it has been argued that when a debt is paid by a stranger the creditor has no further claim on it.—“In the case of bills of exchange a payment made by the drawer or endorser to the holder is taken to operate merely in discharge of his own distinct liability, and not in discharge of the acceptor; the holder may afterwards claim the full amount against the acceptor, and so far as he has been paid will claim as trustee for the drawer or endorser who has paid.⁵ But if the bill has been accepted for the accommodation of the drawer, the payment by him will discharge the bill absolutely, because the drawer is the party ultimately liable.”⁶—In the Roman law payment by any person whatsoever extinguished the debt. “Nec tamen interest quis solvat utrum ipse qui debet, *an alius pro eo*; liberatur enim et alio solvente, sive

¹ Leake, 2d ed. 913; Benj. on Sales, 3d Am. ed. §§ 741, 756; Read v. Goldring, 2 M. & S. 86; Belshaw v. Bush, 11 C. B. 191; Simpson v. Eggington, 10 Ex. 845; Walter v. James, L. R. 6 Ex. 127; see *infra*, § 1008.

² Walter v. James, L. R. 6 Ex. 127; see comments in Benj. on Sales, § 756.

³ James v. Isaacs, 12 C. B. 791; Kemp v. Balls, 10 Ex. 607; Lucas v. Wilkinson, 1 H. & N. 420. That such has been held to be the rule in New York, see *infra*, § 1008.

⁴ Willes, J., in Cook v. Lister, 3 C.

B. N. S. 594; per cur. in Thurman v. Wild, 11 A. & E. 461, cited in Leake, 2d ed. 912; and see Jones v. Broadhurst, 9 M. & Sc. 173; Simpson v. Eggington, 10 Exch. 845. In this country the rule has been repudiated in Ohio and Iowa, see *infra*, § 1008.

⁵ Jones v. Broadhurst, 9 C. B. 173; Williams v. James, 15 Q. B. 498; Randall v. Moon, 12 C. B. 261; Thornton v. Maynard, L. R. 10 C. P. 695.

⁶ Leake, 2d ed. 913; Lazarus v. Cowie, 3 Q. B. 459; Cook v. Lister, 13 C. B. N. S. 543.

sciente, sive ignorante debitore vel invito solutio fiat.”¹ The Roman law, however, on the whole question of unauthorized agency, took a position widely different from our own; the Roman law in many cases supporting such agency, our law in all cases discountenancing it.² The reasoning already expressed in reference to the policy of permitting strangers to meddle in contracts to which they are not parties, applies to the question of permitting strangers to extinguish debts they do not owe. If a stranger can do this, he may acquire a power over me I may not desire to concede. There may be cases in which it may be to my advantage to keep a debt alive, as where collateral questions of domicile or taxation may be involved, or where, recognizing the moral obligation of a debt, though not technically due, I may not choose to have a new creditor whom I do not like imposed on me in the place of one to whom I am used. Even supposing paying the debt may be a great benefit to me, no one should be permitted to burden me with a great benefit without my consent. To many persons the acceptance of such bounties would be intolerable; and the fact that such bounties are received may in other cases work a serious injury to the party receiving them. Yet if the position here contested be sound, any stranger would have a right to intervene and extinguish an indebtedness without the debtor’s consent; and it would follow from this that such an extinguishment would be worked by a tender by a stranger as well as by a payment. Revocable payments, also, cannot bind; but all unratified payments by third parties are revocable. The better view is that a payment only concludes when adopted by the debtor; though on this question the same division of opinion is likely to exist in our courts as exists in reference to the right of third parties to sue on contracts.³

§ 943. Payment made in the usual course of business, either to a general agent of the principal, or to an agent specially authorized to receive the debt, concludes the

Payment to
an agent

¹ Inst. I. 3, tit. 29, 1.

² See discussion, *supra*, § 787.

³ See for further authorities, *infra*, §

1008; see *supra*, §§ 785 *et seq.* for controversy on this question in general.

duly authorized is payment to principal. principal.¹—The conditions of a general agency, or special agency in the above sense, are discussed in detail in another work.²—Authority to receive payment does not authorize payment by a set-off in an account between the agent and the debtor of debts due from the agent, unless this be in conformity with a course of dealing of which the principal has notice.³

§ 944. When a solicitor is employed to bring suit, a payment to him of the sum in controversy extinguishes the debt.⁴ The same rule applies in this country to attorneys-at-law;⁵ and both here and in England an attorney-at-law may compromise a suit in litigation so as to bind his client, if the transaction be *bona fide*.⁶

But payment to a solicitor's clerk, without special authority, does not bind the principal.⁷ And the possession of mortgages or other securities by a solicitor does not imply authority to the solicitor to receive the debt due on the security.⁸ And an attorney-at-law can only receive currency in payment of debt.⁹

¹ See Wh. on Agency, §§ 206, 580, 741, 783; *Catterall v. Hindle*, L. R. 1 C. P. 186; S. C., L. R. 2 C. P. 368; *De Valengin v. Duffy*, 14 Pet. 282; *Corlies v. Cummings*, 6 Cow. 181; *Sangston v. Maitland*, 11 Gill & J. 286; *Marsh v. Laforest*, 1 La. An. 7.

² Wh. on Agency, §§ 135 *et seq.*; and see *Noble v. Nugent*, 89 Ill. 522.

³ Leake, 3d ed. 909; *Bartlett v. Pentland*, 10 B. & C. 760; *Todd v. Reid*, 4 B. & Ald. 605; *Stewart v. Aberdeen*, 4 M. & W. 211; *Underwood v. Nicholls*, 7 C. B. 239; *Catterall v. Hindle*, L. R. 2 C. P. 368; *Greenwood v. Burns*, 50 Mo. 52. An agent, also, can only receive payment in lawful currency. Wh. on Ag. § 210. That an agent is limited to the reception of currency in payment of debt, see *Favenc v. Bennett*, 11 East, 38; *Todd v. Reid*, 4 B. & Ald. 210; *Bartlett v. Pentland*, 10 B. & C. 760; *Underwood v. Nicholls*, 17 C. B. 239; *Williams v. Evans*, L. R. 1 Q. B. 352; *Lumpkin v.*

Wilson, 5 Heisk. 555; *Chapman v. Cowles*, 41 Ala. 103; *Renard v. Turner*, 42 Ala. 117; and see *infra*, § 961.

⁴ Wh. on Ag. § 590; *Powel v. Little*, 1 W. Bl. 8; *Crozer v. Pilling*, 4 B. & C. 28; *Bevins v. Hulme*, 15 M. & W. 96; *Swinfen v. Swinfen*, 2 De G. & J. 381; *Strauss v. Francis*, L. R. 1 Q. B. 379; *Erwin v. Blake*, 8 Pet. 18; *Brackett v. Norton*, 4 Conn. 517.

⁵ Wh. on Ag. § 583.

⁶ Wh. on Ag. § 590.

⁷ Wh. on Neg. § 604; *Kirton v. Braithwaite*, 1 M. & W. 310.

⁸ *Viney v. Chaplin*, 2 D. & J. 468.

⁹ Wh. on Ag. § 583. That an attorney is liable to his client if he receive anything but legal currency in payment of a debt sued on, see *Savoury v. Chapman*, 8 Dow. 656; *Lord v. Burbank*, 18 Me. 178; *Patten v. Fullerton*, 27 Me. 58; *Carter v. Talcott*, 10 Vt. 471; *Kellogg v. Gilbert*, 10 Johns. 220; *Huston v. Mitchell*, 14 S. & R. 307; *Kent v. Ricards*, 23 Md. Ch. 392; *Wil-*

§ 945. A factor is entitled to receive payment and give receipt for the price of goods sold;¹ though he is restricted to the reception of currency which is a legal tender;² nor can he set off his private debt against the vendee.³ The same rule obtains as to an auctioneer in possession of goods, unless the conditions of sale limit him;⁴ though an auctioneer has no authority to receive an acceptance as cash.⁵ Authority to receive payment, however, is not ordinarily vested in a broker not entrusted with the possession of goods, unless a contrary business usage be shown.⁶ Whether a person sitting in an office or shop is entitled to receive payment depends upon whether he is then in a position of apparent trust.⁷ If he is obviously not an agent, the payment does not hold.⁸

Factors and auctioneers may receive payment, but not brokers.

§ 946. Payment to one partner is a payment to the firm, each partner being a general agent of the firm for the collection of debts.⁹ It is otherwise, however,

Payment to one partner

kinson *v.* Holloway, 7 Leigh, 277; Trumbull *v.* Nicholson, 27 Ill. 149; Child *v.* Dwight, 1 Dev. & Bat. Eq. 171; Jeter *v.* Haviland, 24 Ga. 252; Cost *v.* Genette, 1 Port. (Ala.) 212; Perkins *v.* Grant, 2 La. An. 328; Ralley *v.* Bagley, 19 La. An. 172; Garvin *v.* Lowry, 15 Miss. 24; Wright *v.* Daley, 26 Tex. 730; Walker *v.* Scott, 13 Ark. 644; and see cases *supra*, § 943.

¹ Wh. on Ag. § 741; Drinkwater *v.* Goodwin, Cowp. 251; Hornby *v.* Lacy, 6 M. & S. 166; Fish *v.* Kempton, 7 C. B. 687.

² Catterall *v.* Hindle, L. R. 1 C. B. 186; *infra*, § 961.

³ *Ibid.*; *infra*, § 1021.

⁴ Wh. on Ag. § 642; Sykes *v.* Giles, 5 M. & W. 645; Williams *v.* Evans, L. R. 1 Q. B. 352; Taylor *v.* Wilson, 11 Met. 44; Broughton *v.* Silloway, 114 Mass. 71; Yourt *v.* Hopkins, 24 Ill. 326.

⁵ Williams *v.* Evans, L. R. 1 Q. B. 352; Townes *v.* Birchett, 12 Leigh, 173.

⁶ Wh. on Ag. § 713; Baring *v.* Cor-

rie, 2 B. & A. 137; Campbell *v.* Hassel, 1 Stark. 133; Irwine *v.* Watson, L. R. 5 Q. B. D. 102, 414; Higgins *v.* Moore, 34 N. Y. 417; Doubleday *v.* Kress, 50 N. Y. 410; Whiton *v.* Spring, 74 N. Y. 169; Peck *v.* Harriott, 6 S. & R. 149; Morris *v.* Ruddy, 5 C. E. Green, 236; Seiple *v.* Irwin, 30 Penn. St. 513.

⁷ Wh. on Ag. §§ 128, 130, 801; Kaye *v.* Brett, 5 Ex. 269; Barrett *v.* Deere, M. & M. 200; Butler *v.* Maples, 9 Wall. 766; Jeffrey *v.* Bigelow, 13 Wend. 518; Cosgrove *v.* Ogden, 49 N. Y. 255; Dows *v.* Green, 16 Barb. 72; Adams Ex. Co. *v.* Schlesinger, 75 Penn. St. 246; Anderson *v.* State, 22 Oh. St. 305; Lyell *v.* Sanborn, 2 Mich. 109; see Fleming *v.* Hector, 2 M. & W. 181; Harris *v.* Simmermann, 81 Ill. 413; Clark *v.* Smith, 88 Ill. 298; Eclipse Windmill Co. *v.* Thorson, 46 Iowa, 181; Fatman *v.* Leet, 41 Ind. 135; Golding *v.* Merchant, 43 Ala. 705.

⁸ Sanderson *v.* Bell, 2 Cr. & M. 304.

⁹ Leake, 2d ed. 910; Henderson *v.* Wild, 2 Camp. 561; Porter *v.* Taylor,

is payment
to firm.

when the debtor knows that the firm has given notice that no firm debts should be paid to the partner in question, and when the payment is made in fraud of the firm, as where the debtor's debt to the partner is set off against the firm's claim against the debtor.¹

§ 947. Executors and administrators are empowered by law to give receipts for purchase-money on sales made by them, and the purchaser is, therefore, not bound to see to the application of the purchase-money.²

Executors
may give
receipts.

And for debts generally, any one of several executors or administrators is entitled to give receipts which, if the transaction be *bona fide* and the payment in full, will operate as a discharge.³ Even "a devastavit by one of two executors or administrators shall not charge his companion, provided he has not intentionally or otherwise contributed to it."⁴

§ 948. A debtor who has notice that his nominal creditor is a mere trustee for another person of whose title he is advised, has been held bound to pay the money to the party beneficially interested, supposing that there is nothing in the power creating the trust authorizing the trustee to give receipts.⁵ A power, however, to a trustee to give receipts, will make the trustee's receipts, received *bona fide*, a discharge, provided the terms of

Trustees
have only
limited
power to
give
receipts.

6 M. & S. 156; Gordon v. Ellis, 7 M. & G. 607; Nottidge v. Prichard, 2 Cl. & F. 379; Duff v. East India Co., 15 Ves. 198; Morse v. Bellows, 7 N. H. 568; Noyes v. R. R., 30 Conn. 1; Pierson v. Hooker, 3 Johns. 68; Shepard v. Ward, 8 Wend. 542; Boswell v. Green, 1 Dutcher, 390; Salmon v. Davis, 4 Binn. 375.

¹ Piercy v. Fynney, L. R. 12 Eq. 69.

² Leake, 2d ed. 908; Lewin on Trusts, 329; Williams on Ex. 6th Am. ed. 245, 946-8, 1820; and cases cited in next note.

³ Leake, 2d ed. 908; Williams on Ex. 6th Am. ed. 946-8; Jacomb v. Harwood, 2 Ves. Sen. 265; Charlton v. Durham, L. R. 4 Ch. 433; Williams v. Nixon, 2 Beav. 472; Edmonds v. Cren-

shaw, 14 Pet. 166; Gilman v. Healey, 55 Me. 120; Shaw v. Berry, 35 Me. 279; Tuckerman v. Newhall, 17 Mass. 581; Ames v. Armstrong, 106 Mass. 18; Douglass v. Satterlie, 11 Johns. 16; Bulkley v. Dayton, 14 Johns. 387; Murray v. Blatchford, 1 Wend. 583; Jackson v. Robinson, 4 Wend. 436; Bogert v. Hertell, 4 Hill, 492; 9 Paige, 52; Shreve v. Joyce, 7 Vroom, 48; Devling v. Little, 26 Penn. St. 502; Worth v. M'Aden, 1 Dev. & Bat. Eq. 199; Welkerson v. Wootten, 28 Ga. 568; Gaultney v. Nolan, 33 Miss. 569; Nettman v. Schramm, 23 Iowa, 521; Weir v. Mosher, 19 Wis. 311.

⁴ Wms. on Ex. 6th Am. ed. 1820.

⁵ Lewin on Trusts, 4th ed. 310; Leake, 2d ed. 907.

the power be followed;¹ and a power to give receipts may be implied from a power to sell for the payment of debts.²—In England, by statute, a trustee has power to give receipts unless precluded by the power under which he holds.³

§ 949. When one of several joint debtors pays the joint debt, this discharges the other debtors from liability to the common creditor.⁴ If, however, the payment turn out not to be operative, as where a bill is given by one of the debtors which is dishonored at maturity, the debt is revived as against all the joint debtors;⁵ and it has been even held, that where a payment by one joint debtor is avoided as a fraud on his creditors, and the money recovered by other creditors of the debtor making the payment, this does not discharge a co-debtor who is a mere surety for the debt.⁶ A part payment by one joint debtor operates only *pro tanto* in favor of the other joint debtor, though it was accepted in satisfaction of the claim against the debtor so paying.⁷ Whether taking a bill or not from one of several partners, discharges the partnership debt in case of dishonor of the paper, has been much discussed. It has been held that it does if it was so intended by the parties.⁸ The question whether this was the intention, is to be determined inferentially from all the facts.⁹

§ 950. When a payment is made *bona fide* to one of several joint creditors, this bars the debt so far as concerns all.¹⁰ If, however, the debtor knew that the creditor

Payment by one joint debtor discharges the other.

Payment to one joint creditor

¹ Leake, 2d ed. 907; citing Elliott v. Merryman, 1 Wh. & T. Lead. Ca. 58.

² Ibid.; Carlyon v. Trescott, L. R. 20 Eq. 348.

³ 23 and 24 Vict. c. 145.

⁴ *Supra*, §§ 831 *et seq.*; Leake, 2d ed. 906; Beaumont v. Greathead, 2 C. B. 494; Thorne v. Smith, 10 C. B. 659. As to liability of joint debtors generally, see *supra*, §§ 824 *et seq.*

⁵ Bottomley v. Nuttall, 5 C. B. N. S. 122; Keay v. Fenwick, L. R. 1 C. P. D. 745.

⁶ Petty v. Cooke, L. R. 6 Q. B. 790.

⁷ Walters v. Smith, 2 B. & Ad. 889; Field v. Robins, 8 A. & E. 90.

⁸ Lyth v. Ault, 7 Exch. 669; Hart v. Alexander, 2 M. & W. 484; overruling Lodge v. Dicus, 3 B. & Ald. 611. And see Harris v. Lindsay, 4 Wash. C. C. 98; Chase v. Vaughan, 30 Me. 412; Arnold v. Camp, 12 Johns. 409; Smith v. Rogers, 17 Johns. 340; Kean v. Dufresne, 3 S. & R. 233; Bernard v. Torrence, 5 Gill & J. 383.

⁹ See Waydell v. Luer, 3 Denio, 410; and cases cited above.

¹⁰ *Supra*, §§ 814 *et seq.*; Wallace v.

releases debt. had no authority to receive the payment, or that the payment was irregular and improper, as where a debt due a partnership is paid by fraudulently setting off a separate debt of one of the partners, the payment, as against the other creditors, will be invalid.¹

Joint deposit in bank can only be drawn by joint order. § 951. When money is deposited in bank in the joint name of two or more parties, it is in trust for the use of all, and can only be withdrawn on the joint order of all the depositors.²

§ 952. The purchase of a debt by a stranger is ordinarily for the purpose of taking an assignment of the debt. The debt remains in full force, the original creditor either holding it to the use of the purchaser, or passing to the purchaser the legal as well as the equitable title.³ Hence, a receipt from a third party of a debt written on a bill of exchange, is no proof of payment, since the price may have been given, not in discharge of the bill, but for the purchase.⁴ As has been already seen, an assignee, by modern practice, can sue in his own name;⁵ though the debtor's assent is necessary to constitute a new contractual relation,⁶ and the assignment is subject to prior equities between assignor and debtor.⁷

Purchase by stranger may be to take assignment of debt.

V. PAYMENT BY NEGOTIABLE PAPER.

§ 953. The reception of a cheque in payment of a debt suspends the remedy on the debt until the cheque has been pre-

Kelsall, 7 M. & W. 264; Jones v. Yates, 9 B. & C. 532; Heilbut v. Nevill, L. R. 5 C. P. 478; Halsey v. Whitney, 4 Mason, 206; Wiggin v. Tudor, 23 Pick. 444; Bruen v. Marquand, 17 Johns. 58; Napier v. McLeod, 9 Wend. 120; Morrow v. Starke, 4 J. J. Marsh. 367; Henry v. Mt. Pleasant Tp., 70 Mo. 500; Clark v. Cable, 21 Mo. 225. That one joint promisee can release, see *supra*, § 821.

¹ *Piercey v. Fynney*, L. R. 12 Eq. 69; *supra*, § 946; *infra*, § 1028; see *Rawstorne v. Gandell*, 15 M. & W. 304.

And a collusive receipt is inoperative. *Barker v. Richardson*, 1 Y. & J. 362; *Hickey v. Burt*, 7 Taunt. 48.

² *Leake*, 2d ed. 905; *Innes v. Stephenson*, 1 M. & Rob. 145. See *Husband v. Davis*, 10 C. B. 645.

³ *Supra*, §§ 526, 836; *Leake*, 2d ed. 914; *M'Intyre v. Miller*, 13 M. & W. 725; *Lucas v. Wilkinson*, 1 H. & N. 420.

⁴ *Graves v. Key*, 3 B. & Ad. 313; *Phillips v. Warren*, 14 M. & W. 379.

⁵ *Supra*, §§ 836 *et seq.*

⁶ *Supra*, § 840.

⁷ *Supra*, §§ 842 *et seq.*

sented and dishonored;¹ but if the cheque is presented and dishonored, the creditor is left free to pursue his original claim.² The receipt of a cheque duly acknowledged is *prima facie* proof of payment.³ The holder of a cheque is bound to use due diligence in its collection; and if through his negligence the cheque is lost, or its presentment is so delayed that it is not paid, in consequence of the bank's failure, or for other reasons, the loss is imputable to him.⁴ A cheque should be presented, according to the English rule, within a day after its receipt, when payable at the same place. If payable at a distance, the time for trans-

Receipt of
cheque
*prima
facie* proof
of payment

¹ *Supra*, § 504; *infra*, § 1003; Leake, 2d ed. 898; Benj. on Sales, 3d Am. ed. §§ 710, 716, 731; Puckford v. Maxwell, 6 T. R. 52; Caine v. Coulton, 1 H. & C. 764; Charles v. Blackwell, L. R. 2 C. P. D. 151; Weddigen v. Elastic Co., 100 Mass. 422; Cromwell v. Lovett, 1 Hall, 56; People v. Baker, 20 Wend. 602; Sweet v. Titus, 67 Barb. 327; Blair v. Wilson, 28 Grat. 165.

² Everett v. Collins, 2 Camp. 515; Bridges v. Garrett, L. R. 5 C. P. 458; Hough v. May, 4 Ad. & El. 954; Small v. Mining Co., 99 Mass. 277; Hodgson v. Barrett, 33 Oh. St. 63; Phillips v. Bullard, 58 Ga. 256; Mordis v. Kennedy, 23 Kan. 408.

³ Carmarthen R. R. v. Manchester R. R., L. R. 8 C. P. 685. As to cheques of third parties see Guild v. Butler, 127 Mass. 386, cited *supra*, § 1003.

In a Massachusetts case, in 1880, the evidence was that D. in good faith borrowed money from a bank, whose officers believed him to be solvent, delivering as collateral a certificate of stock in a corporation. Upon the loan becoming due, D. paid the interest, and offered, in payment of the principal, a cheque on a third person with whom he had no funds, he being insolvent at the time, and with no reasons to expect that the cheque would be paid.

The bank accepted the cheque, and delivered to D. the collateral, and D.'s memorandum, marked "paid." On the same day, at a later hour, D. returned to the bank the certificate of stock, but not the memorandum. It was held that the loan was not paid, and that the bank was entitled to retain the certificate of stock as security for the loan. Holmes v. Fall River Bank, 126 Mass. 353. In London Bank v. Groom, L. R. 8 Q. B. D. 288, it was held that while cheques are primarily intended for speedy payment, there is no fixed rule of law that the holder of a "stale" cheque takes it at his peril, and so is affected with any equities attaching to the instrument, as is the case with overdue bills of exchange and promissory notes. It was, however, ruled that where an action is brought on a "stale" cheque, it is not enough for the holder to prove that he came by it *bona fide*, gave value for it, and had no notice of any equities attaching to it, but he must prove that he did not take the cheque under such circumstances as ought to have excited suspicion in the mind of a reasonable and prudent person.

⁴ Robinson v. Hawksford, 9 Q. B. 52; Merchant's Bank v. Spicer, 6 Wend. 443; Cromwell v. Lovett, 1 Hall, 56.

mission by post should be taken into account.¹ But a cheque need not, according to the prevalent view in this country, be presented on the day of its reception.² If the cheque be not presented within reasonable time, it operates as payment.³—Where a cheque, given to pay a debt due the drawee, was not presented at the bank for payment, but was lodged by the drawee in the hands of the drawer's clerk, this was held to be no payment.⁴—Where the cheque is not paid, the payee (there being no laches on his part) may fall back on the original cause of action.⁵ Nor need the cheque be presented, if the drawer had no funds, and the cheque would have been dishonored.⁶ In a case in Michigan, in 1880, the evidence was that D., being indebted to C., gave him an order on T. in payment. The order was held by C. for three days, after which time, on being presented for payment to T., payment was refused; and ten days afterwards T. became insolvent. Notice was not given of non-payment until four days after refusal. It was held that C. might recover the original debt from D., there having been under the circumstances no unreasonable delay on C.'s part in realizing the draft, and no proof of any injury to D.⁷ The case, it should be remembered, occurred in a country district, not subject to any prevalent mercantile custom requiring immediate presentation.—Where part payment of purchase money was made by a post-dated cheque, and before the date of payment the purchasers had notice that the vendor was adjudicated bankrupt, but they did not stop payment of the cheque, it was held that they would have to pay the money over again to the trustee.⁸

¹ Leake, 2d ed. 879; Boddington v. Schlenker, 4 B. & Ad. 752; Alexander v. Burchfield, 7 M. & G. 1061; Pridaux v. Cridle, L. R. 4 Q. B. 455.

² Foster v. Paulk, 41 Me. 425; Merchant's Bank v. Spicer, 6 Wend. 443; Gough v. Staats, 13 Wend. 549.

³ Byles on Bills, 9th ed. 19; Hopkins v. Ware, L. R. 4 Ex. 268; Smith v. Miller, 43 N. Y. 171.

⁴ Dennie v. Hart, 2 Pick. 204.

⁵ Cromwell v. Lovett, 1 Hall, 56.

⁶ Ibid.; Cushing v. Gore, 15 Mass. 74; Eichelberger v. Finley, 7 Har. & J. 38, and other cases cited 2 Ch. on Con. 11th Am. ed. 1106, and see *supra*, § 606.

⁷ Briggs v. Parsons, 39 Mich. 400.

⁸ Armstead *ex parte*, 45 L. T. N. S. 557.

§ 954. It is competent for the parties to agree that a negotiable security given by the debtor to the creditor should be held by the creditor merely as collateral security.¹ It has been held, also, that a note payable on demand, as long as it remains in the creditor's hands, is to be regarded only as a collateral security, until it is proved that it was taken in satisfaction.²

Negotiable security may be taken as a mere collateral.

¹ *Benj. on Sales*, 3d Am. ed. § 737; *Pring v. Clarkson*, 1 B. & C. 14; *Peacock v. Pursell*, 14 C. B. N. S. 728; *Welch v. Allington*, 23 Cal. 322; *Brown v. Olmsted*, 50 Cal. 162. As to extinction of old debt by merger, see *supra*, § 860.

² *Leake*, 2d ed. 892; citing *Fearn v. Cochrane*, 4 C. B. 274.

Whether a negotiable security was given in satisfaction of a debt or only as collateral security depends upon the construction of the agreement between the parties. *Benj. on Sales*, 3d Am. ed. § 729. "The debt may be considered as actually paid, if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied. But, in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt is no more than giving an extended credit, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs payment cannot legally be enforced, but the debt continues till payment is actually made; and, if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given." *Langdale, M. R.*, in *Sayer v. Wagstaff*, 5 Beav. 423; and

see *Maillard v. Argyle*, 6 M. & G. 40, *Bottomley v. Nuttall*, 5 C. B. N. S. 122, to same effect. See further *infra*, § 956.

In Maine, "the acceptance of negotiable paper for a debt, and giving a receipt in discharge thereof, are an extinguishment of the original liability, unless the parties did not so intend." *Crosby v. Redman*, 70 Me. 56; *Mehan v. Thompson*, 71 Me. 501.

In Massachusetts, the rule "that a negotiable promissory note, given for a simple contract debt, shall be deemed a payment, is to be taken with considerable qualification. . . . This is a presumption of fact, which may be rebutted by evidence that it was not so intended; and the fact that such a presumption would deprive the party who takes the note of a substantial benefit has a strong tendency to show that it was not so intended." *Curtis v. Hubbard*, 9 Met. 328. "It is well settled in this commonwealth that the law will presume that the giving of a promissory note for a simple contract debt is payment of the debt; but this is not a conclusive presumption, but may be rebutted and controlled by proof. And in many cases it has been decided that if the debt is a note secured by mortgage, the renewal of the note, or the substitution of another note therefor, is not necessarily to be presumed a payment, so as to discharge the mortgage." *Endicott, J.*, *Dodge v. Emerson*, 131 Mass. 467; citing *Taft v. Boyd*, 13 Allen, 84, and

When the paper is held merely as collateral security, the vendor's duty "is the same as if the bill had been given in con-

cases there cited. See *Melledge v. Boston Iron Co.*, 5 Cush. 158; *Curtis v. Hubbard*, 9 Metc. 327; *Parham Sewing Machine Co. v. Brock*, 113 Mass. 194. There is no presumption of payment where the note given is that of an agent to an undisclosed principal. *Lovell v. Williams*, 125 Mass. 439; and see *infra*, § 956.

The rule in New Jersey and New York, differing widely from the above, is thus stated by Van Fleet, V.-C., in *Wildrick v. Swain*, 34 N. J. Eq. 170: "The proposition is quite elementary that the acceptance of the promissory note of a debtor, for a precedent debt, will not operate as a discharge or satisfaction of the debt, unless it is agreed that such shall be its effect. In *Schanck v. Arrowsmith*, 1 Stock. 323, Chancellor Williamson declared that the principle was firmly established that the taking of an additional or other security, of inferior or equal degree, would not *ipso facto* discharge a lien which attached by reason of an original security. He further said: 'If the original security is actually cancelled, or the lien created by it formally released, of course no resort can be had to it. It is always a question of intention, sometimes to be ascertained by the legal construction of written instruments, and sometimes by the circumstances of the case.' The New York adjudications go one step further in protecting the right of the creditor to his original cause of action. It is there held that the acceptance by a creditor of a new promise from his debtor to pay a preëxisting debt affords no defence whatever to a suit on the original cause of action, even if the creditor expressly agrees that the new promise shall operate as

a satisfaction of the old. And the reason assigned for refusing to give legal efficacy to the promise of the creditor is, that it has no consideration to support it, being a mere *nudum pactum*. *Frisbie v. Larned*, 21 Wend. 452; *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Luer*, 5 ib. 448; S. C. on error, 3 Den. 410; *Rice v. Dewey*, 54 Barb. 455." And see *Putnam v. Lewis*, 8 Johns. 389; *Conkling v. King*, 10 Barb. 372; and discussion in *Smith's L. C.* 7th Am. ed. 620 *et seq.*

In Pennsylvania the rule was thus stated in 1881, by *Mercur, J.* (*Hunter v. Moul*, 12 Rep. 605): "The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment, or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred. *Leas v. James*, 10 S. & R. 307; *M'Ginn v. Holmes*, 2 Watts, 121; *Weakly v. Bell*, 9 ib. 273; *McIntyre v. Kennedy*, 5 Casey, 448; *Brown v. Scott*, 1 P. F. S. 357; *League v. Waring & Co.*, 4 Norris, 244.

"When the transfer of a note is a conditional payment, it is necessary to inquire what the true condition was, and, if not fulfilled by the person accepting it, what injury, if any, has resulted from the breach. The cases are not in harmony as to the effect of a failure to present the note of a third person and give notice of its dishonor, when no injury therefrom has resulted to the debtor. We shall not attempt to review them. Great regard must be had to the character of the transaction.

ditional payment; and if he neglect to present, or to give notice of dishonor to the buyer, the buyer will be discharged from liability on the bill, and the laches will operate so as to constitute the bill absolute payment for its amount.”¹ But, as we will see more fully, if a debtor’s own immature note is taken on account of a debt, the ordinary inference is that the debt is not extinguished, but only suspended until the maturity of the note, when the creditor may elect to revert to the original debt. The note is not to be regarded as payment,

If the debtor indorse the note, a more stringent rule prevails as to notice than if he transferred it by delivery only. When the guaranty is absolute that a specific act shall be done by another, it was said in *Vinal v. Richardson*, 13 Allen, 521, demand and notice need not be averred, although the want of them may be a defence on the ground of negligence to the extent of the resulting injury. One who has merely guarantied it, but whose name is not on the bill or note, is not in general entitled to notice of non-payments. *Chitty on Bills*, 498. If the bill or note be given as collateral security, and the party delivering it were no party to it, either by indorsing or transferring by delivery when payable to bearer, but merely caused it to be drawn, indorsed, or delivered by a third party as security, or has merely guarantied the payment, it has been considered that he is not, within the custom of merchants, a party to it so as to be entitled to strict regular notice, nor discharged from his liabilities, by the neglect of the holder to give him such notice, unless he can show by express evidence, or by inference, that he has sustained loss by omission. *Ibid.* 441.

“The guarantor of a note does not stand in the same situation as parties to it. His obligation is in the nature of an insurance of the debt, and there is no need of the same proof to charge

him as if he were an indorser. The necessity of demand in order to charge the indorser is solely grounded on the custom of merchants, and applies only to actions against the indorser or the bill itself. It does not apply when the guarantor is not an indorser. *Gibbs v. Cannon*, 9 S. & R. 199; *Overton v. Tracey*, 14 ib. 311; *M’Lughan v. Bo-vard*, 4 Watts, 308. The law is clearly stated in 2 *Parsons on Notes and Bills*, 184, where it is said if paper be transferred by delivery only as security for a pre-existing debt, and it is dishonored while in the hands of the transferee, it affects in no way the debt it was intended to secure. Upon dishonor of the paper it is not necessary to give him notice thereof as an indorser, but the debtor may show in defence any injury he has sustained by the actual laches of the creditor. Nor does the fact that the collaterals were exchanged for other securities, which were ultimately found worthless, change the liability, unless it is further shown that a loss resulted to the owner of the collaterals by reason of such exchange. *Girard Ins. Co. v. Marr*, 10 Wr. 504.” As to rule where negotiable paper is taken in payment of goods, see *infra*, § 956.

¹ *Benj. on Sales*, 3d Am. ed. § 737, citing *Peacock v. Pursell*, 14 C. B. N. S. 728; *Hazard v. Wells*, 2 Abb. N. C. 444.

unless by agreement of the parties it comes in by way of novation as a substitute for the old debt.¹ And *a fortiori*, a promissory note not payable at a bank and not governed by law merchant will not operate as payment, in absence of agreement to that effect.²

§ 955. When goods are, by the agreement of sale, to be paid for by the buyer's note or acceptances, or like forms of credit, the inference is that the payment is only conditional, and that, upon dishonor of the paper, the seller may sue for the price of the goods.³ On the other hand,

¹ *Peter v. Beverly*, 10 Pet. 532; *Kemmil v. Wilson*, 4 Wash. C. C. 308; *Wallace v. Agry*, 4 Mason, 336; *Bangor v. Warren*, 34 Me. 324; *Ripley v. Greenleaf*, 2 Vt. 129; *Reed v. Upton*, 10 Pick. 525; *Ilseley v. Jewett*, 2 Met. (Mass.) 168; *Hughes v. Wheeler*, 8 Cow. 77; *Frisbie v. Larned*, 21 Wend. 450; *Waydell v. Luer*, 5 Hill, 448; *Bank of Penna. v. Potius*, 10 Watts, 148; *Lord v. Ocean Bank*, 20 Penn. St. 384; *Swope v. Leffingwell*, 72 Mo. 348; *Graves v. Shulman*, 59 Ala. 406. And see as generally sustaining the text, *Peter v. Beverly*, 10 Pet. 532; *Wallace v. Agry*, 4 Mason, 336; *Bell v. Porter*, 9 Conn. 23; *Burdick v. Green*, 15 Johns. 247; *Vansteenburgh v. Hoffman*, 15 Barb. 28; *Keen v. Dufresne*, 3 S. & R. 233; *Geiser v. Kershner*, 4 Gill & J. 305; *Prescott v. Hubbell*, 1 McC. 94; *Barelli v. Brown*, 1 McC. 449; *Minis v. McDowell*, 4 Ga. 182.

² *Hill v. Sleeper*, 58 Ind. 221; *Bristol Milling Co. v. Probensee*, 64 Ind. 406; *Linderman v. Rosenfield*, 67 Ind. 246; *Jeffries v. Lamb*, 73 Ind. 202.

³ *Leake*, 2d ed. 894; *Paul v. Dod*, 2 C. B. 800; *Helps v. Winterbottom*, 2 B. & Ad. 431; *Gunn v. Bolckow*, L. R. 10 Ch. 500; *Mayer v. Nyas*, 1 Bing. 311; *Harris v. Johnston*, 3 Cranch, 311; *Brigham v. Lally*, 130 Mass. 485. See *Herring v. Sanger*, 3 John. Cas. 71; *Tyson v. Pollock*, 1 Pen. & W. 375;

Little v. Sewing Machine Co., 67 Ind. 67; *Hoeflinger v. Wells*, 47 Wis. 628.

In *Swain v. Frazier*, N. J. Ct. of Errors, 1882 (14 Rep. 277), *Magie, J.*, on delivering the opinion of the court, said: "The vice-chancellor further held that the acceptance of the promissory note of a debtor for his pre-existing debt will not operate as a discharge or satisfaction of the debt, unless the creditor agrees that such shall be its effect. The question involved in this proposition, though much discussed elsewhere, is now for the first time, so far as I can ascertain, presented for the consideration of this court. The question is not a new one in the courts of this state. In 1853 Chancellor Williamson held that, whether a note given for a legacy, charged upon land of the maker, was to operate in payment of the legacy or not, was a question of the intention of the parties to the transaction. *Schanck v. Arrowsmith*, 1 Stock. 314. In *Shipman v. Cook*, 1 C. E. Green, 251, Chancellor Green seems to admit the same rule as unquestionable. In *Freeholders v. Thomas*, 5 C. E. Green, 39, Chancellor Zabriskie said that it was well settled 'that a note, either of the debtor or a third person, received for a debt, is not payment, if not itself paid, except in cases where it is positively agreed to be received in payment. The same principle was ap-

if the creditor have offered to him the choice between cash and negotiable paper, and takes the negotiable paper, this will be regarded as satisfaction.¹ The question to be determined on all the circumstances of the case is, whether the paper was taken in payment, or merely as security.² If the creditor gives a receipt in full, the inference of satisfaction will be strong,³ though this may be explained by extrinsic proof.⁴ The question as to the intention of the parties is for the jury.⁵—If the note of a third party is accepted in payment of goods, the inference is that the note was received in full satisfaction for the goods,⁶ supposing the note be genuine and there be no fraudulent concealment.⁷ But unless the note was taken in satisfaction, it does not discharge a pre-existing debt.⁸

plied by Vice-Chancellor Van Fleet in *Hutchinson v. Swartsweller*, 4 Stew. Eq. 205. Under such circumstances it would be questionable whether, if there were doubts respecting the rule, it would be wise at this day to attempt to modify or reverse it. But the rule is sustained by the great weight of authority in England and in this country. Mr. Addison so states the rule to be established in his work on Contracts, and the English cases may be found collected in the notes to § 333 of Morgan's edition. The American cases are collected in the note to 2 Parsons on Contr. *624, *681, and in the notes to *Tobey v. Barber*, 2 Am. L. C. 5th ed. 245, and to *Cumber v. Wane*, 1 Smith L. C. 7th Am. ed. 595. Later cases will be found in *Bigelow on Bills and Notes*, 499. According to the nearly unanimous doctrine of these cases, a creditor may agree to accept a new promise of the debtor in satisfaction of a pre-existing debt. The rule applied by the vice-chancellor seems to be entirely satisfactory."

¹ *Marsh v. Pedder*, 4 Camp. 257; *Smith v. Ferrand*, 7 B. & C. 19; *Anderson v. Hillies*, 12 C. B. 499. See *Bab-*

cock v. Hawkins, 23 Vt. 561; *McClure v. Andrews*, 68 Ind. 97; *infra*, § 957.

² *Robinson v. Read*, 9 B. & C. 449; *Sard v. Rhodes*, 1 M. & W. 153; *Wiseman v. Lyman*, 7 Mass. 286; *Perit v. Pitfield*, 5 Rawle, 166; *Glenn v. Smith*, 2 Gill & J. 494. See *supra*, §§ 954 *et seq.*

³ *Ibid.*; *Wheeler v. Schroeder*, 4 R. I. 383.

⁴ *Feamster v. Withrow*, 12 W. Va. 611.

⁵ *Benj. on Sales*, 3d Am. ed. § 729; *Goldshede v. Cottrell*, 2 M. & W. 20; *Lyman v. Bank*, 12 How. U. S. 225; *Johnson v. Cleaves*, 15 N. H. 332; *Coburn v. Odell*, 30 N. H. 540; *Vail v. Foster*, 4 Comst. 312; *Cake v. Bank*, 86 Penn. St. 303; *Gordon v. Price*, 10 Ired. 385; *Moore v. Briggs*, 15 Ala. 24; *Fulfud v. Johnson*, 15 Ala. 386; *Steamboat Charlotte v. Hammond*, 9 Mo. 59.

⁶ *Whitbeck v. Van Ness*, 11 Johns. 409. As to merger, see *supra*, §§ 684, 860; *infra*, §§ 1001, 1040.

⁷ *Markle v. Hatfield*, 2 Johns. 455; *Willson v. Foree*, 6 Johns. 110. The earlier American cases will be found discussed in detail in Smith's L. C. 7th Am. ed. 614 *et seq.*

⁸ *Ibid.*; *Wildrick v. Swain*, 34 N. J.

Whether one note accepted in exchange for another is a payment of the original note or merely a collateral, depends, also, upon the intention of the parties as evidenced by the facts of the particular case.¹

§ 956. The accepting of negotiable paper as yet immature, suspends a debt on account of which it is given; though in case of its dishonor at maturity, the debt is revived in full force.² Until the security is matured and paid, the debt remains in abeyance;³ when the security is paid this extinguishes the debt, either in full, if the security is for the amount of

Acceptance of immature negotiable paper on account suspends debt and operates as conditional payment.

Eq. 170; *Walsh v. Lennon*, 98 Ill. 27; *Krutsinger v. Brown*, 72 Ind. 466. See *supra*, § 860, as to discharge of pre-existing debt; and as to accord and satisfaction, see *infra*, § 1001.

In *Lord v. Bigelow*, 124 Mass. 185, the plaintiff received two promissory notes under the understanding that he would release a debt due him from the defendant should they be paid at maturity. He procured the discounting of one of these notes, taking it up when protested for non-payment, and the other he pressed to judgment in a friend's name, but received nothing on either. It was held that on tendering the first note and an assignment of the judgment on the other, he was entitled to recover on the debt.

¹ *Supra*, §§ 852 *et seq.*; *Cadiz Bank v. Slemmons*, 34 Oh. St. 142; *Robertson v. Bank*, 41 Mich. 356; and see fully *infra*, § 1001.

In *McKee v. Hamilton*, 33 Oh. St. 7, a note in renewal of a partnership debt was given by one partner only, with the same sureties, however, as the original debt. The sureties signed the renewal on the faith of representations that this was necessary for the business of the firm, and on the promise by the partner signing that his co-partner would also sign as principal. It was held that as against such sure-

ties this did not operate to extinguish the original debt; and that the sureties, on paying the renewal note, might recover from the partners.

² *Leake*, 2d ed. 891; *Benj. on Sales*, 3d Am. ed. § 729; *Stedman v. Gooch*, 1 Esp. 4; *Kearslake v. Morgan*, 5 T. R. 513; *Baker v. Walker*, 14 M. & W. 465; *Belshaw v. Bush*, 11 C. B. 191; *Currie v. Misa*, L. R. 10 Ex. 163; *Worthington ex parte*, L. R. 3 C. D. 803; *Peter v. Beverly*, 10 Pet. 532; *Elliott v. Sleeper*, 2 N. H. 525; *Chamberlin v. Perkins*, 55 N. H. 237; *Seymour v. Darrow*, 31 Vt. 122; *Bill v. Porter*, 9 Conn. 23; *Ilseley v. Jewett*, 2 Met. (Mass.) 168; *Van Ostrand v. Reed*, 1 Wend. 424; *Geller v. Seixas*, 4 Abb. Pr. 103; *Cole v. Sackett*, 1 Hill, 516; *Hill v. Beebe*, 13 N. Y. 556; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Hays v. McClurg*, 4 Watts, 452; *Weekly v. Bell*, 9 Watts, 273; *Thayer v. Peck*, 93 Ill. 357; *Smith v. Bettger*, 68 Ind. 254; *Briggs v. Parsons*, 39 Mich. 400; *Hughes v. Israel*, 73 Mo. 538; *Griffith v. Grogan*, 12 Cal. 321; *Brown v. Olmstead*, 50 Cal. 162. As to merger of old debt in new, see *supra*, §§ 684, 860; *infra*, §§ 957, 1040.

³ *Sayer v. Wagstaff*, 5 Beav. 415; *Okie v. Spencer*, 2 Whart. 253; *Proctor v. Mather*, 3 B. Mon. 353.

the debt,¹ or *pro tanto*, when it only covers a part of the debt.² In several jurisdictions in this country, negotiable paper taken for the price of goods is regarded as unconditional payment, this, however, open to rebuttal by proof of a different understanding.³—The payment of the security relates back as to time to the giving the receipt, the payment dating from that period.⁴

§ 957. A negotiable security may be accepted in discharge of a debt, when such is the understanding of the parties, in

¹ *Thorne v. Smith*, 10 C. B. 659.

² *Bottomley v. Nuttall*, 5 C. B. N. S. 122. Mr. Benjamin (Sales, 3d Am. ed. § 730) says: "The authorities in support of the rule that in the absence of stipulation to the contrary, the negotiable security is only considered to be a conditional payment, defeasible on the dishonor of the security, need not be reviewed, as there is no conflict on the point." To this, he cites among other cases, *Owenson v. Morse*, 7 T. R. 64; *Puckford v. Maxwell*, 6 T. R. 52; *Griffiths v. Owen*, 13 M. & W. 58; *James v. Williams*, 13 M. & W. 828; *Belshaw v. Bush*, 11 C. B. 191; *Ford v. Beech*, 11 Q. B. 873; *Plimley v. Westley*, 2 Bing. N. C. 249; *Valpy v. Oakley*, 16 Q. B. 941. The American editor cites to the same effect, *Middlesex v. Thomas*, 5 C. E. Green, 39; *Archibald v. Argall*, 53 Ill. 307; *Guion v. Doherty*, 43 Miss. 538; *Syracuse R. R. v. Collins*, 3 Lansing, 29; *Burkhalter v. Bank*, 42 N. Y. 538; *May v. Gamble*, 14 Fla. 467. As to novation in such cases, see *supra*, § 856. That a payment of a pre-existing debt by draft of third party is conditional, see *League v. Waring*, 85 Penn. St. 244.

³ See *Benj. on Sales*, 3d Am. ed. § 752, and note *a*; citing, among other cases, *Wallace v. Agry*, 4 Mason, 336; *Clap in re*, 2 Low. 226; *Kimball v. Ship Anna Kimball*, 2 Cliff. 4; *Hudson*

v. Bradley, 2 Cliff. 130; *Paine v. Dwinel*, 53 Me. 52; *Ward v. Bourne*, 56 Me. 161; *Hutchins v. Olcott*, 4 Vt. 549; *Wait v. Brewster*, 31 Vt. 516; *Watkins v. Hill*, 8 Pick. 522; *Reed v. Upton*, 10 Pick. 525; *Wood v. Bodwell*, 12 Pick. 268; *Melledge v. Iron Co.*, 5 Cush. 158; *Thurston v. Blanchard*, 22 Pick. 18; *Camp v. Gullett*, 2 Eng. (Ark.) 524; *Costar v. Davies*, 3 Eng. (Ark.) 213; and see cases *supra*, § 954. In *Clap in re*, *Lowell, J.*, said: "The difference between the law of Massachusetts and that of England, and most of the states of the Union, I understand to be merely this; that in the courts of this state a negotiable bill or note is taken to be a more beneficial security than a book account, or any debt of that kind; and though it does not operate as a merger in law, is presumed *prima facie* to be taken as payment. But it is a mere question of fact, and any evidence which rebuts the presumption is competent and it is easily overcome." To the same effect, see *Morrison v. Smith*, 81 Ill. 221; *Kappes v. Lumber Co.*, 1 Ill. App. 280; *Frazer v. Boss*, 66 Ind. 1; *Mehlberg v. Fisher*, 24 Wis. 607. As to the distinctive rule in Massachusetts, New York, and Pennsylvania, see *supra*, § 954.

⁴ *Belshaw v. Bush*, 11 C. B. 191; *Turney v. Dodwell*, 3 E. & B. 136.

which case the dishonor of the security does not revive the debt.¹ If the buyer offers to pay cash, and the vendor takes a negotiable security in preference, the security is taken as an absolute payment.² Hence, a plea that a bill or note was given in full satisfaction and discharge has been held good on demurrer, and the replication that it was not paid when due has been held bad.³ And as elsewhere stated, a negotiable security for a fractional amount of a debt may be received in satisfaction of the debt when such is the intention of the parties, the creditor thinking (rightly or erroneously) that a higher security for a less sum is better than a lower security for a greater sum.⁴ When negotiable paper is thus taken in satisfaction, a vendor cannot fall back on the original consideration.⁵ When a prior debt secured by a note is thus satisfied, the note is extinguished.⁶

§ 958. When a debtor gives on account of his debt negotiable paper on which he is liable as drawer or endorser, the acceptance of this paper is *prima facie* an answer to a suit for the debt; and the creditor is bound in reply to account for the bill. If by his negligence the party primarily bound is freed from liability, this discharges the debtor, not only from his secondary liability on the paper, but from his liability on the original contract.⁷ Where the creditor takes

Negotiable paper may be accepted in satisfaction of a debt.

Negotiable paper taken in payment may bar suit when holder by negligence releases paper.

¹ *Supra*, § 860; *infra*, § 1001; Leake, 2d ed. 891; *Lichfield v. Green*, 1 H. & N. 884; *Lewis v. Lyster*, 2 C. M. R. 704; see *Meyer v. Lathrop*, 73 N. Y. 315; *Cake v. Bank*, 86 Penn. St. 303.

² *Benj. on Sales*, 3d Am. ed. § 731; *Strong v. Hart*, 6 B. & C. 160; *Robinson v. Read*, 9 B. & C. 449; *Anderson v. Hillies*, 12 C. B. 499; *Cowasjee v. Thompson*, 5 Moore P. C. 165; *supra*, § 956.

³ *Sibree v. Tripp*, 15 M. & W. 23; see fully as to accord and satisfaction, *infra*, §§ 996 *et seq.*

⁴ See *supra*, § 504; *infra*, §§ 1000-1.

⁵ *Benj. on Sales*, 3d Am. ed. § 732;

Sibree v. Tripp, 15 M. & W. 23. As to novation in such cases, see *supra*, § 856. As to merger of old debt, *supra*, §§ 684, 860; *infra*, §§ 959, 1040.

⁶ *Bantz v. Basnett*, 12 W. Va. 772; *supra*, §§ 852 *et seq.* That a partnership debt may be extinguished by taking negotiable paper from one partner, see *supra*, § 862.

⁷ *Price v. Price*, 16 M. & W. 232; *Camidge v. Allenby*, 6 B. & C. 373. By statute 3 and 4 Anne, a bill of exchange taken in satisfaction of a debt amounts to payment when the holder does not "take his due course to obtain payment." See *Peacock v.*

paper on which the debtor is primarily liable, the debtor must show, if he set up the paper in bar to an action for the original debt, either that the paper is still due, or that if overdue it has been paid or endorsed away to other parties so as to keep afloat the liability of the debtor.¹ When, also, the debtor pays to his creditor negotiable paper to which he is not a party, and on which his name does not appear, this is to be regarded as payment unless it be shown that due steps were taken to collect the paper, but that these steps failed.² If there be laches in pursuit of the bill, so that the liability of the parties is discharged, this, if imputable to the creditor, discharges the debt.³

§ 959. Before a vendor can repudiate a negotiable security and bring suit on the price, he must account for the security; since otherwise it may turn up in the hands of third parties, and the purchaser be compelled to pay twice.⁴ If negotiable paper is passed by the

If passed to others, or lost, or altered, this may bar remedy.

Purcell, 14 C. B. N. S. 728; *Smith v. Miller*, 43 N. Y. 171; *Auburn Bank v. Hunsicker*, 72 N. Y. 252; *Thompson v. Cooper*, 57 Ala. 560.

¹ *Price v. Price*, 16 M. & W. 232; *National Bank v. Tranch*, L. R. 2 C. P. 556.

² *Camidge v. Allenby*, 6 B. & C. 373; *Rogers v. Langford*, 1 C. & M. 637; *Robson v. Oliver*, 10 Q. B. 704; *Smith v. Mercer*, L. R. 3 Ex. 51; see *Price v. Price*, 16 M. & W. 232.

³ *Benj. on Sales*, 3d Am. ed. § 735; *Swinyard v. Bowes*, 5 M. & S. 62; *Galagher v. Roberts*, 2 Wash. C. C. 191; *Clark v. Young*, 1 Cranch, 181; *Swett v. Southworth*, 125 Mass. 417; *Ormsby v. Fortune*, 16 S. & R. 302; *M'Lughan v. Bovard*, 4 Watts, 308; *Mehlberg v. Tisher*, 24 Wis. 607; *Taylor v. Daniel*, 9 B. Mon. 53; *Thomason v. Cooper*, 57 Ala. 560.

In *Smith v. Mercer*, L. R. 3 Ex. 51, the purchaser gave a bill drawn on Feb. 20th by B.'s Bank of Liverpool or London, but though the vendor put it in circulation, it was not presented in

London until April 23d, when it was dishonored, B.'s bank having failed on April 19th. No notice of dishonor was given to the purchaser. It was held that he was discharged, the court ruling that the vendor either took the bill as cash, in which case there was no further liability, or as a negotiable security, in which case the purchaser could not be put in a worse position than he would have been had he endorsed the bill. It will be observed that this was the case of a country bank note, which it is not the practice to present at maturity. And in England it is held that there is no laches in the mere failure to present country bank notes for payment at the bankers on finding they have failed, if the notes are returned to the purchaser within a reasonable time. *Robson v. Oliver*, 10 Q. B. 704; *Rogers v. Langford*, 1 C. & M. 637.

⁴ *Benj. on Sales*, 3d Am. ed. § 733; *Price v. Price*, 16 M. & W. 232; *Bunney v. Poyntz*, 4 B. & Ad. 568; *Swett v. Southworth*, 125 Mass. 417.

vendor to third parties, it is a bar to his recovery of the debt.¹ Nor can the vendor recover the price of goods for which he has taken negotiable paper which he has lost,² nor when he has so altered a bill as to vitiate it and preclude the purchaser from using it against antecedent parties;³ though it is otherwise when the purchaser is the party primarily liable on the bill.⁴

§ 960. A payment made by means of a void security may be repudiated by the creditor without taking any steps to pursue the parties liable on the face of the paper.⁵ "If the securities thus passed were forged or counterfeited; or if not what on their face they purport to be, as if they appeared to be foreign bills needing no stamp, but were really domestic bills invalid for want of a stamp, the vendor would be entitled to rescind the sale for failure of consideration."⁶ Hence a payment in forged notes is a nullity.⁷ "A forged note delivered in payment does not operate as a satisfaction or extinguishment of an antecedent debt or demand."⁸ And the purchaser who knowingly palms off a worthless security (though genuine) on a vendor, is liable for a fraud, and the vendor may rescind the sale and bring trover for the goods;⁹ or he may recover back the money paid on such worthless security.¹⁰ Where, also, both parties are ignorant

¹ See *Belshaw v. Bush*, 11 C. B. 191; and criticism of *Miles v. Golton*, 2 C. & M. 504, in *Smith's Mercantile Law*, 539; *Benj. on Sales*, 3d Am. ed. § 736.

² *Crowe v. Clay*, 9 Ex. 604. That the original bill must be produced, see *Ramuz v. Crowe*, 1 Ex. 167.

³ *Alderson v. Langdale*, 3 B. & Ad. 661.

⁴ *Atkinson v. Handon*, 2 Ad. & E. 628.

⁵ *Cundy v. Marriott*, 1 B. & Ad. 696; *Cabot Bank v. Morton*, 4 Gray, 156; *Markle v. Hatfield*, 2 Johns. 455; *Mudd v. Reaves*, 2 Har. & J. 368; *Simms v. Clark*, 11 Ill. 137; *Hargrave v. Dusenbury*, 2 Hawks, 326. That money paid on void security may be recovered back, see *supra*, § 744.

⁶ *Benj. on Sales*, 3d Am. ed. § 739;

2 Ch. Cont. 11th Am. ed. 1106; *Goodrich v. Tracy*, 43 Vt. 314.

⁷ *Young v. Adams*, 6 Mass. 182; *Gloucester Bk. v. Salem Bk.*, 17 Mass. 33; *Thomas v. Todd*, 6 Hill, N. Y. 340; *Ramsdale v. Horton*, 3 Barr, 330; *Keene v. Thompson*, 4 Gill & J. 463.

⁸ *Boynton, C. J., Emerine v. O'Brien*, 36 Oh. St. 496; citing *Goodrich v. Tracy*, 43 Vt. 314; *Eagle Bk. v. Smith*, 5 Conn. 71; *Markle v. Hatfield*, 2 Johns. 455; *Ritter v. Singmaster*, 73 Penn. St. 400; 2 *Dan. Neg. Inst.* § 1274.

⁹ *Benj. on Sales*, 3d Am. ed. § 739; *Read v. Hutchinson*, 3 Camp. 352; *Hawse v. Crowe, R. & Mood*, 414; *Camidge v. Allenby*, 6 B. & C. 373; *Stewart v. Emerson*, 52 N. H. 301.

¹⁰ *Supra*, § 744.

of the insolvency of the maker of a promissory note paid by one to the other, the party taking the note is entitled to recover the amount of the original debt from the party from whom the note was taken.¹—The fact that the parties paying and receiving were ignorant that a bank which has issued notes received in payment failed prior to the reception, does not vary the case. The loss falls on the party paying and not on the party receiving.²

VI. PAYMENT IN BANK NOTES.

§ 961. As is elsewhere noticed, a payment in bank notes is valid when a legal tender.³ When bank notes are not a legal tender, they will nevertheless constitute, if not objected to, payment; though the creditor may demand currency.⁴—When money is sent by post, at the creditor's request, to an address given by him, or if such mode of transmission is the practice between the parties, and the money is lost, this is an adequate payment.⁵ But the letter must be rightly addressed.⁶

Payment in bank notes valid when a legal tender.

VII. PAYMENT BY LETTER.

§ 962. When a creditor designates the post as the way in which payment is to be made to him, and his directions are followed, then the post-office is to be regarded as the agent of the creditor, and he takes the risk.⁷ The posting of a letter, properly addressed and stamped, to a person known to be doing

Payment by letter sufficient when in accordance with instructions.

¹ *Roberts v. Fisher*, 43 N. Y. 159; *supra*, § 744. Where money, which is stolen from a creditor by a debtor, is delivered to the creditor, who accepts it in payment of the debt, this is no payment. *State Bank v. Welles*, 3 Pick. 394.

² *Frontier Bank v. Morse*, 22 Me. 88; *Fogg v. Sawyer*, 9 N. H. 365; *Gilman v. Peck*, 11 Vt. 516; *Wainwright v. Webster*, 11 Vt. 576; *Com. v. Stone*, 4 Met. 43; *Magee v. Carmack*, 13 Ill. 289; see, however, *contra*, *Lowrey v. Murrell*, 2 Port. 280.

³ *Infra*, § 984.

⁴ *Ibid*. That an agent is bound to receive only currency, see *supra*, § 943, and so of an attorney, *supra*, § 944. The question of void or forged notes has been already noticed, *supra*, § 960.

⁵ *Kington v. Kington*, 11 M. & W. 233; *Warwicke v. Noakes*, Peake, 67; *Wakefield v. Lithgow*, 3 Mass. 249.

⁶ *Gorden v. Strange*, 1 Ex. 477; and see cases in next section.

⁷ *Warwicke v. Noakes*, Peake, 67; *Skelbeck v. Garbett*, 7 Q. B. 846; *New Haven Bk. v. Mitchell*, 15 Conn. 206; *Shoemaker v. Bank*, 59 Penn. St. 79; and cases cited in last section. As to posting acceptance, see *supra*, § 18.

business in a place where there is a regular delivery of letters, is *prima facie* proof of the reception of the letter by the person to whom it is addressed.¹ The letter, however, must be correctly and specifically directed,² and when particular instructions have been given by the creditor, these should be followed.³

VIII. PAYMENT IN GOODS AND SET-OFF.

§ 963. When it is agreed between debtor and creditor that certain goods are to be taken in satisfaction of a debt, the delivery and acceptance of the goods will be regarded as a payment, either in full or *pro tanto*, as the case may be.⁴ The exchange of goods for goods is a barter; and so is an exchange of goods for labor; "and barter, so far as concerns the remedy, is distinguishable from sale, in that in barter the declaration must be special."⁵ "In both cases," however, "the title to the property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter."⁶ Whether the giving or receiving of goods is a payment, is a question of fact. It may happen that it may be a matter of doubt whether the goods were received as payment, or as items in a line of business transactions, so as to constitute simply a set-off. As to this, the intention of the parties, as evidenced by their words and dealings, must determine.⁷

¹ Wh. on Ev. § 1323, and cases there cited; and see *supra*, § 961.

² *Gordon v. Strange*, 1 Exch. 477; *Walter v. Haynes*, Ry. & M. 149; *Allen v. Blunt*, 2 Wood. & M. 121.

³ *Wakefield v. Lithgow*, 3 Mass. 249; see *Phillips v. Scott*, 43 Mo. 86; and cases cited to § 961.

⁴ *Leake*, 2d ed. 889; *Hands v. Burton*, 9 East, 349; *Saxty v. Wilkin*, 11 M. & W. 622; *Williamson v. Berry*, 8 How. U. S. 544; *Costello v. Cady*, 102 Mass. 140; *Stevenson v. State*, 65 Ind.

409; *Edwards v. Cottroll*, 43 Iowa, 194.

⁵ *Barbe v. Parker*, 1 H. Bl. 287; *Harrison v. Luke*, 14 M. & W. 139; *Guerreiro v. Peile*, 3 B. & Ald. 616; *Mitchell v. Gile*, 12 N. H. 390; *Vail v. Strong*, 10 Vt. 457.

⁶ *Bigelow, J., Com. v. Clark*, 14 Gray, 372.

⁷ *Strong v. Kennedy*, 40 Mich. 327; see *Bacon v. Lamb*, 4 Col. 578. As to set-off, see *infra*, § 1009.

§ 964. It may be part of the understanding of parties dealing with each other, that the cash indebtedness of the one to the other shall be limited to the balance, after subtracting from the account debts admitted on both sides. If so, the set-off is equivalent to a payment, and may be so pleaded.¹ The courts will give such effect to agreements of this class, if executed in good faith, as is calculated to promote the best interests of all parties.² "The way in which an agreement to set one debt against another of equal amount, and discharge both, proves a plea of payment, is this: if the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the gross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment, it has the same effect, because in contemplation of law, a pecuniary transaction is supposed to have taken place by which each debt was then paid."³ The set-off, however, must be perfected in order to be operative.⁴

Set-off, when agreed to, equivalent to payment.

§ 965. When there is an agreement between A. and B. for mutual set-off, whether such agreement be express or implied, debts from A. to B., which would be outlawed under the statute of limitations, are extinguished by the common set-off. The old outlawed debts are thrown into a gross mass with those not outlawed, and the balance due from A. is not within the statute.⁵ If an agreement of general set-off is shown, it operates even to cancel debts of which the consideration may be illegal.⁶ An agreement, however, for a general set-off must

Set-off appropriated to debts excluded by statute, and to illegal debts.

¹ Benj. on Sales, 3d Am. ed. § 711; Leake, 2d ed. 889; citing Co. Lit. 213 a; Sinclair v. Baggaley, 4 M. & W. 312; Cellander v. Howard, 10 C. B. 290; Sturdy v. Arnaud, 3 T. R. 599; Leeds v. Burrows, 12 East, 1, where it was said that this mode of payment may be part of the original agreement in contracting the debts. As to set-off generally see *infra*, §§ 1009 *et seq.*

² Doyle v. Donnelly, 56 Me. 27.

³ Lord Campbell, C. J., in Livingstone v. Whiting, 15 Q. B. 723; Mel-

lish, L. J., in Livingstone v. Whiting, 15 Q. B. 723; Spargo's case, L. R. 8 Ch. 414; Rance's case, L. R. 6 Ch. 104; cited Leake, 2d ed. 889.

⁴ Gray v. White, 108 Mass. 228; see *infra*, §§ 1009 *et seq.*

⁵ Leake, 2d ed. 890; Ashby v. James, 11 M. & W. 542; Scholey v. Walton, 12 M. & W. 510; Worthington v. Grimsditch, 7 Q. B. 479.

⁶ Owens v. Denton, 1 C. M. & R. 711.

be shown in order to have this effect, since without such an agreement the mere existence of counter-claims will not exclude the statute, or preclude the illegality of a consideration from being excepted to.¹

IX. EFFECT OF PAYMENT.

§ 966. No matter how great may be the damage a creditor may sustain from the non-payment of his debt at maturity, he is not entitled to recover anything beyond principal and interest from his debtor. Damages for detention of debt limited to interest. “Nominal” damages he indeed recovers, but this is “a sum of money that may be spoken of, but that has no existence in point of quantity.”² If before suit is brought the creditor accepts satisfaction for his debt, he cannot afterwards recover any damages whatever for the detention.³ But after suit is begun, payment of the debt does not extinguish the plaintiff’s claim for costs and nominal damages.⁴

§ 967. After suit is brought, payment, in order to satisfy a debt, must be for interest and costs as well as for debt.⁵ Payment of the debt, by itself, does not bar the further pressure of the suit. Thus, when a holder of negotiable paper sues severally the parties liable on it, payment in full in one suit does not bar him from proceeding in the other suits for judgment on the penalty.⁶ After suit brought, payment must cover interest and costs as well as debt

¹ Leake, 2d ed. 890; *Cottam v. Part-ridge*, 4 M. & G. 271; *Clark v. Alexander*, 8 Scott, N. R. 147.

² Leake, 2d ed. 885.

³ *Beamont v. Greathead*, 2 C. B. 496.

⁴ Leake, 2d ed. 885; *Nosotti v. Page*, 10 C. B. 643; *Cook v. Hopewell*, 11 Ex. 555; *Ash v. Pouppeville*, L. R. 3 Q. B. 86; and see as to effect of tender, *infra*, §§ 970 *et seq.*

⁵ Leake, 2d ed. 886; *Thame v. Boast*,

12 Q. B. 808; *Gell v. Burgess*, 7 C. B. 16. See as to tender, *infra*, § 976.

⁶ *Randall c. Moon*, 12 C. B. 261; *Goodwin v. Cremer*, 18 Q. B. 757. See further, *infra*, §§ 971 *et seq.* The payment, by the Roman law also, must be of the exact sum in money; for *aliud pro alio* cannot be rendered *invito creditore*. L. 27, and 50 D. h. t. Any other kind of payment requires the concurrence and approval of the creditor, and releases the debtor only *ope exceptionis*.

CHAPTER XXX.

TENDER.

I. TENDER OF MONEY IN DISCHARGE OF DEBT.

Distinction between tender of debt and tender of something in compliance with contract, § 970.

Tender is an offer of payment in full of a debt, § 971.

Tender stops interest and costs, § 972.

Tender not admissible for unliquidated damages, § 973.

May be made under protest, § 974.

Tender otherwise admits debt, § 975.

To discharge litigated debt, money must be paid into court, § 976.

Conditional tender inoperative, § 977.

Tender must be of exact sum, § 978.

To divisible debt there may be tender *pro tanto*, § 979.

Tender must be on precise day and in place fixed, § 980.

Plea of tender must set forth constant readiness to pay, § 981.

Tender may be made to or by agent or joint creditor or debtor, § 982.

Tender of money must give opportunity for inspection, though this may be waived, § 983.

Tender must be in current coin, but this may be waived, § 984.

Objection to character of money may be waived, § 985.

Cheque or other security is not tender, § 986.

II. DISTINCTIVE RULE AS TO GOODS.

Tender of goods must be specific, § 987.

Must be unconditional, § 988.

Goods must exactly correspond with description, and be merchantable by local law, § 989.

If delivered at time and place fixed, this is sufficient, § 990.

Party fixing place should notify other party, § 991.

Designation required as to bulky articles, § 992.

Tender of goods may transfer title, § 993.

Tender may be a prerequisite to establish a duty, § 994.

Tender may be waived, § 995.

I. TENDER OF MONEY IN DISCHARGE OF DEBT.

§ 970. TENDER is of two kinds. The first is where a debtor offers to his creditor money sufficient to pay a definite debt. This, as we will see, suspends interest on the debt and precludes damages for non-payment. The second is where there is an obligation by a party to a sale to deliver to the other party either goods or money at a specific time and place.

Distinction between tender of a debt and tender of something in compliance with contract.

Here a tender duly made extinguishes the claim. In the first case, therefore, the tender is the admission of an indebtedness, in the second it is the extinction of an indebtedness. The two kinds of tender, therefore, are widely different, and some confusion has arisen from their being discussed under one general head. In the present chapter they will be treated separately, so far as concerns their distinctive characteristics.¹

§ 971. A tender in the first sense is an offer of money in payment in full of a definite debt which has matured, and, to be effective, must cover not only the debt, but all interest which has accrued on it.² If made in lieu of payment, it must embrace a sum of money equal to the sum due.³ If made after a suit has commenced, it must also include all costs that have been incurred in its maintenance.⁴ A tender rests on the supposition "that the defendant has been always ready to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it."⁵ It claims, therefore, that, as the plaintiff could have got what he wanted without suit, suit was unnecessary and vexatious.⁶

§ 972. When a debt is due, the debtor's liability, so far as concerns future accruing interest, is put an end to by a tender of the debt.⁷ But if the tender be refused, and the debtor in any way consents to the

¹ As to time of performance of a contract, see *supra*, §§ 881 *et seq.* As to payment, see *supra*, §§ 923 *et seq.*

² *Bac. Abr.* Tender; *Com. Dig.* Tender. That tender must be made personally, see *supra*, § 873.

³ *Infra*, § 978; *Benj. on Sales*, § 713; *Startup v. Macdonald*, 6 M. & G. 593; *Sargent v. Graham*, 5 N. H. 440; *Case v. Green*, 5 Watts, 262; see *Springport v. Bank*, 84 N. Y. 403.

⁴ *Emerson v. White*, 10 Gray, 351; see *Stevens v. Briggs*, 14 Vt. 44.

⁵ *Per cur.* in *Dixon v. Clark*, 5 C. B. 377; *James v. Vane*, 2 E. & E. 883; adopted *Leake*, 2d ed. 858.

⁶ *Carley v. Vance*, 17 Mass. 369; *Coit v. Houston*, 3 Johns. Ca. 243; *Law v. Jackson*, 9 Cow. 641; *Cornell v. Green*, 10 S. & R. 14; *Fuller v. Pelton*, 16 Ohio, 457; *Verges v. Giboney*, 38 Me. 458.

⁷ *Dixon v. Clark*, 5 C. B. 365; *Dent v. Dunn*, 3 Camp. 296; *Carley v. Vance*, 17 Mass. 389; *Law v. Jackson*, 9 Cow. 641; *Cornell v. Green*, 10 S. & R. 14.

continuance of the indebtedness, interest continues to run.¹ A tender, however, to stop interest, must imply continuous readiness to pay.²—In New York, a tender of payment after maturity of a debt releases the lien of a mortgage given to secure it,³ and so in Michigan.⁴ But the general rule is that, at common law, a tender after breach of the condition does not operate as a discharge of the mortgage.⁵ In New Hampshire, payment after the day is made good by statute.⁶

¹ See *Kirton v. Braithwaite*, 1 M. & W. 310; *Norton v. Ellam*, 2 M. & W. 461; *Maltby v. Murrells*, 5 H. & N. 813; *Hendee v. Howe*, 33 N. J. Eq. 92; and cases cited *infra*, § 980.

"It is now settled, by the decision of the queen's bench in 1860 in *James v. Vane*, 2 E. & E. 883, overruling *Cooch v. Maltby*, 23 L. J. Q. B. 305, and affirming the earlier case of *Dixon v. Walker*, 7 M. & W. 214, that a tender is a bar to the action quoad its amount, and not merely a bar to damages." *Benj. on Sales*, 3d Am. ed. § 728.

² *Gray v. Angier*, 62 Ga. 596. Where a promissory note is payable on demand, it is due immediately on its delivery (*infra*, § 980), though it does not carry interest until demand unless it be so provided by its own terms. *Leake*, 2d ed. 861.

³ *Kortright v. Cady*, 21 N. Y. 343; *Edwards v. Ins. Co.*, 21 Wend. 467.

⁴ *Potts v. Plaisted*, 30 Mich. 149.

⁵ *Jones on Mort.* 2d ed. §§ 9, 892; *Rowell v. Mitchell*, 68 Me. 21; *Erskine v. Townsend*, 2 Mass. 493; *Currier v. Gale*, 9 Allen, 522; *Holman v. Bailey*, 3 Met. 55; *Shields v. Lozear*, 34 N. J. L. 496; *Story v. Krewson*, 55 Ind. 397; *Perre v. Castro*, 14 Cal. 519; *Himmelman v. Fitzpatrick*, 50 Cal. 650.

⁶ See *Robinson v. Leavitt*, 7 N. H. 73.

In Minnesota it is held that a tender of a mortgage debt to the sheriff after the foreclosure sale, and a refusal by

him to receive the amount necessary to redeem, does not operate as a discharge of the lien of the holder of the certificate of sale. *Schroeder v. Lahman*, S. C. Minn. 1881. In this case *Mitchell, J.*, said: "The only question in the case is, whether a mere tender to the sheriff, and a refusal by him to receive the amount necessary to redeem, operates as a discharge of the lien of the holder of the certificate of sale. We are of opinion that this question must be answered in the negative. In such case the sheriff is not his agent, but merely the officer of the law with whom the redemptioner, if he sees fit, may deposit the money instead of paying it to the party to whom it belongs. No act of his can prejudice the rights of the holder of the certificate of sale. *Horton v. Maffitt*, 14 Minn. 289; *Davis v. Seymour*, 16 ib. 210; *Tinkcom v. Lewis*, 21 ib. 132; *Gilchrist v. Comfort*, 34 N. Y. 235. The only office or effect of such tender and refusal is that it will preserve and protect the right of the redemptioner to have the redemption perfected, if such right be seasonably asserted. The sheriff being the officer of the law, and not the agent of either party, his refusal to receive the money and to execute a certificate of redemption does not destroy the redemptioner's right, if seasonably asserted, to have the redemption perfected and properly evidenced; neither does it impair the right of the holder

§ 973. In England, though there is authority to the effect that a tender is pleadable to a *quantum meruit*,¹ there can be no such plea to a suit for unliquidated damages.² In this country, under statute, in suits for damages for injuries, tenders are in some states allowed;³ though at common law the English rule obtains.⁴

§ 974. A tender may be made under protest; the party saying that he tenders the amount in controversy without admitting that he is bound for the debt;⁵ though the payment, in such case, if received, is absolute, and if not received, the tender is not operative if qualified by any condition.⁶

§ 975. If not made under protest, a tender admits the validity of the contract on which the payment is proposed to be made; and a plea of tender relieves the plaintiff from the necessity of proving his case.⁷ But a mere payment of money into court, without a specific designation of the debt it is meant to extinguish, does not, when the suit covers several claims, and the payment is only *pro tanto*, admit any specific claim.⁸ It is otherwise when the two counts which the declaration contains are for the same claim, the one stating it generally, on a *quantum meruit*, and

of the certificate to the redemption money, or, failing that, to acquire absolute title to the premises."

¹ *Giles v. Hart*, 2 Salk. 622, though see report of this case in 1 Lord Ray. 255, and criticism in note to *Dearle v. Barrett*, 2 Ad. & E. 82.

² *Dearle v. Barrett*, 2 Ad. & E. 82.

³ See *Brown v. Neal*, 36 Me. 407; *Slack v. Brown*, 13 Wend. 390.

⁴ *Green v. Shurtliff*, 19 Vt. 592; *Huntington v. Bk.*, 6 Pick. 340; *Raymond v. Barnard*, 12 Johns. 274; *Law v. Jackson*, 9 Cow. 641.

⁵ *Scott v. R. R.*, L. R. 1 C. P. 596 (overruling *Simmons v. Wilmot*, 3 Esp. 91); *Manning v. Lunn*, 2 C. & K. 13; *Sweny v. Smith*, L. R. 7 Eq. 324; *Gas-*

sett v. Andover, 21 Vt. 342. See *Benj. on Sales*, 3d Am. ed. § 725.

⁶ *Wood v. Hitchcock*, 20 Wend. 47. See *Gassett v. Andover*, 21 Vt. 342, where it was held that a tender made in full of all legal claims, which is received by the creditor with a protest that the sum is not sufficient, the creditor at the same time saying he will receive the money, and pass it to the debtor's account, will not bar the creditor's right to recover any amount due him exceeding the tender.

⁷ *Stafford v. Clark*, 2 Bing. 377; *Bennett v. Francis*, 2 B. & P. 550; *Jones v. Hoar*, 5 Pick. 291; *Huntington v. Bank*, 6 Pick. 340.

⁸ *Stapleton v. Nowell*, 6 M. & W. 9; *Charles v. Branber*, 12 M. & W. 743.

the other stating a contract of service ; in which case the paying money into court admits the contract.¹

§ 976. To constitute a discharge of a litigated debt, the plea must be accompanied by the payment, in suits on a money claim, of the money sued for into court ; and unless the money be so paid in, the plaintiff is entitled to judgment for the amount admitted to be due, with costs.² If the money, after a tender, be paid into court, the plaintiff, who persists in litigating the case and obtains judgment only for the amount paid in, cannot recover costs accruing after the tender.³ It is not necessary to show that the specific money paid into court is that actually tendered.⁴ The tender, in order to bar an action, must be pleaded.⁵

To discharge litigated debt, money must be paid into court.

§ 977. The tender, to be operative, must be absolute. The debtor can place on it no conditions other than those incident to the nature of the transaction ;⁶ and thence if made on the condition that the creditor would admit other claims to be unfounded, or that it cancels the debtor's general indebtedness, it is a nullity.⁷—It has also been held that a condition that a full receipt should be given

Conditional tender inoperative.

¹ *Elgar v. Watson*, 1 C. & M. 494 ; *Batchelder*, 4 N. H. 40 ; *Buffum v. Wright v. Goddard*, 8 Ad. & E. 144 ; *Buffum*, 11 N. H. 451 ; *Loring v. Cooke*, Bennett *v. Francis*, 2 B. & P. 550 ; 3 Pick. 48 ; *Richardson v. Chemical Laboratory*, 9 Met. 42 ; *Wood v. Hitchcock*, 20 Wend. 47 ; *Eastland v. Longshorn*, 1 N. & McC. 194 ; *Flake v. Nuse*, 51 Tex. 98 ; see *Gould v. Bank*, 86 N. Y. 75.

² *Chapman v. Hicks*, 2 C. & M. 633 ; *Gilkeson v. Smith*, 5 W. Va. 128 ; see *supra*, § 960.

³ *Leake*, 2d ed. 859 ; see *Harmer v. Priestley*, 16 Beav. 569 ; *Shiver v. Johnston*, 62 Ala. 37 ; *supra*, § 960.

⁴ *Colby v. Stevens*, 38 N. H. 191.

⁵ *Hegler v. Eddy*, 53 Cal. 597.

⁶ *Benj. on Sales*, 3d Am. ed. § 721 ; *Bevans v. Rees*, 5 M. & W. 309 ; *Finch v. Miller*, 5 C. B. 428 ; *Steam Stoker Co. in re*, L. R. 19 Eq. 416 ; *Brown v. Gilmore*, 3 Greenl. 110 ; *Robinson v. Reynolds*, 7 Ad. & E. 80 ; *Evans v. Judkins*, 4 Camp. 156 ; *Forde v. Noll*, 2 Dow. N. S. 617 ; *Bowen v. Owen*, 11 Q. B. 131 ; *Mitchell v. King*, 6 C. & P. 237 ; *Sutton v. Hawkins*, 8 C. & P. 259 ; *Hastings v. Thorley*, 8 C. & P. 573 ; *Hepburn v. Auld*, 1 Cranch, 321 ; *Richards v. Chem. Lab.*, 9 Met. 42 ; see *Brooklyn Bank v. Degrauw*, 23 Wend. 342.

vitiates a tender, though the creditor cannot afterwards on this ground impugn a tender made to him when at the time of the tender the only objection he made was to the amount.¹ And a debtor is, in any view, not entitled to insist on a receipt in full of all demands when this would cover a larger ground than that covered by the tender;² nor is the creditor bound to give such a receipt when it would cover anything more than the actual tender.³ If the condition, however, be one purely formal, which the debtor had a right to make, it does not vitiate the tender.⁴ And a condition not objected to at the time may be regarded as waived.⁵—The meaning of an ambiguous tender is for the jury; if unambiguous, for the court.⁶—A tender, as we

¹ *Richardson v. Jackson*, 8 M. & W. 298; *Laing v. Meader*, 1 C. & P. 257; see *Thayer v. Brackett*, 12 Mass. 450. In *Cole v. Blake*, Peake, 179, 238, and *Laing v. Meader*, 1 C. & P. 257, it was held that a stamped receipt could not be exacted. But in *Richardson v. Jackson*, 8 M. & W. 298, Rolfe, B., said: "I should be sorry to hold this to be a bad tender" (there being no objection at the time to the receipt being required) "on account of the receipt having been mentioned. I should wish to encourage all prudent people to take receipts, for if they do not, in case of death, the representatives may be deprived of all evidence of the payment." *Benj. on Sales*, 3d Am. ed. § 726, referring also to *Loring v. Cooke*, 3 Pick. 48; *Richardson v. Chemical Laboratory Co.*, 9 Met. 42; *Wood v. Hitchcock*, 20 Wend. 47.

In England by stat. 16 & 17 Vict. c. 59, stamps have to be attached to all receipts of 2*l.* or over, and the debtor is empowered to tender a blank receipt duly stamped at the time of payment. And it was held in *Jones v. Arthur*, 8 Dowl. 442, that a tender made by a cheque in a letter was not vitiated by the fact that the letter requested a receipt in return.

² *Glasscott v. Day*, 5 Esp. 48; *Thayer v. Brackett*, 12 Mass. 450; *Sanford v. Bulkley*, 30 Conn. 344; *Wood v. Hitchcock*, 20 Wend. 47; see *Foster v. Drew*, 39 Vt. 51.

³ *Cheminant v. Thornton*, 2 C. & P. 50; *Sanford v. Bulkley*, 30 Conn. 344.

⁴ *Saunders v. Frost*, 5 Pick. 259; *Wheelock v. Tanner*, 39 N. Y. 481.

⁵ *Richardson v. Jackson*, 8 M. & W. 298; *Saunders v. Frost*, 5 Pick. 259.

⁶ *Eckstein v. Reynolds*, 7 Ad. & E. 80; *Marsden v. Goode*, 2 C. & K. 133. In *Bowen v. Owen*, 11 Q. B. 130, adopted by *Mr. Benj.* (3d Am. ed. § 724) as giving the latest law on this topic, a tenant sent an agent to his landlord with a letter, saying: "I have sent with the bearer, T. T., a sum of 26*l.* 5*s.* 7½*d.* to settle one year's rent of Nant-y-pair." The agent told the landlord he had the money with him, but the landlord refused it, saying more was due. The agent went away, but soon came back again, saying he had a few pounds more in his pocket to pay certain arrears of duties, but the landlord again refused, saying more was due. It was held in the king's bench that the tender was conditional, *Earle, J.*, saying: "The person making a tender has a right to exclude pre-

have already seen, is not vitiated by the fact that it is accompanied by a protest.¹

§ 978. A tender of a sum greater than that due, is not sufficient when the sum is exhibited in large notes or coin, and the creditor is called upon to make change which he refuses to do;² though it is otherwise when the sum is in itself divisible, so that the excess can be at once returned to the debtor and the remainder retained.³ And when there are several debts due from the same debtor, a gross tender of all these sums is sufficiently formal;⁴ though, as will be presently seen, when a debt is divisible a tender of a substantive part is good and operates to relieve *pro tanto*; though a tender of a fraction of an indivisible claim is inoperative.⁵ But a tender on a debt secured by a common money bond need not be for the penalty. It is sufficient if for the actual indebtedness.⁶—A proposition to pay a mortgage debt if certain interest alleged to be usurious be stricken off, is not a tender.⁷—A creditor, however, who puts it out of his debtor's power to know the exact sum due, cannot object to a tender, on the ground that it does not reach the exact sum, supposing that it adequately approximates to such sum.⁸ Thus, where a vendor wrongfully destroyed the contract of sale on which prior payments to him were endorsed, it was held that a tender by the vendee of a less sum than that actually due, together with an offer to pay whatever might prove to be really due, was sufficient.⁹

Tender
must be of
exact sum.

sumptions against himself, by saying, 'I pay this as the whole that is due you,' but if he requires the other party to accept it as all that is due, that is imposing a condition; and when the offer is so made, the creditor may refuse to consider it as a tender."

¹ *Supra*, § 974.

² *Watkins v. Robb*, 2 Esp. 711; *Batterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Sargent v. Graham*, 5 N. H. 440; *Boyden v. Moore*, 5 Mass. 365.

³ *Leake*, 2d ed. 864; *Wade's case*, 5

Co. 115 a; *Douglas v. Patrick*, 3 T. R. 683; *Dean v. James*, 4 B. & Ad. 546; *Beavans v. Rees*, 5 M. & W. 306. A tender, though not in technical shape such as to bar costs, may operate so as to suspend interest. *Suffolk Bank v. Worcester Bank*, 5 Pick. 106.

⁴ *Thetford v. Hubbard*, 22 Vt. 440.

⁵ *Infra*, § 979.

⁶ *Tracy v. Strong*, 2 Conn. 659.

⁷ *Harmon v. Magee*, 57 Miss. 410.

⁸ See *supra*, §§ 603, 612, 716, 747.

⁹ *Downing v. Plate*, 90 Ill. 268.

§ 979. Where an indebtedness consists of several divisible claims, a tender to pay one of them may be *pro tanto* good.¹ And a tender may be made to one of several items;² though, unless the tender in such case go specifically to a single divisible debt, it is inoperative.³ But to enable a tender to take effect in respect to one out of several claims of the creditor on the debtor, it must be distinctly pointed to such claim. If made generally, without being thus apportioned, and if it be insufficient to meet the aggregate indebtedness, it fails to take effect.⁴ When a claim is not divisible, a tender of money to pay a part of it is defective unless accepted *pro tanto* by the creditor;⁵ though an acceptance *pro tanto* would not preclude him from claiming the residue.⁶—A tender cannot be made by tacking a set-off to a sum in cash;⁷ though the practice may be different in jurisdictions where set-offs extinguish claims prior to suit.⁸—A reception of an amount smaller than an alleged entire indebtedness does not impair the creditor's right to the part of his claim not thus paid off.⁹

§ 980. Whenever by the terms of a contract a debt must be paid on a particular day, it must at common law be tendered on that day; and the tender must be made a sufficient time before midnight to enable the other party to receive and count it.¹⁰ This has frequently

¹ Leake, 2d ed. 865; Benj. on Sales, 3d Am. ed. § 719; Jones v. Owen, 5 Ad. & E. 222; Branden v. Newington, 3 Q. B. 915; Hesketh v. Fawcett, 11 M. & W. 356; Dixon v. Clark, 5 C. B. 365. As to divisibility, see *supra*, §§ 233, 338, 511, 552, 899.

² Robinson v. Ward, 8 Q. B. 920.

³ Ibid.; Tyler v. Bland, 9 M. & W. 338; Searles v. Sadgrove, 5 E. & B. 639.

⁴ Leake, 2d ed. 865; Benj. on Sales, 3d Am. ed. § 719; Strong v. Harvey, 3 Bing. 304; Hardingham v. Allen, 5 C. B. 793.

⁵ Dixon v. Clark, 5 C. B. 365; Boyden v. Moore, 5 Mass. 365; Cupples v. Gallighan, 6 Mo. Ap. 62.

⁶ Dixon v. Clark, 5 C. B. 365; Bowen v. Owen, 11 Q. B. 130.

⁷ Leake, 2d ed. 865; citing Searles v. Sadgrove, 5 E. & B. 639; Phillpotts v. Clifton, 10 W. R. Ex. 135; Bellows v. Smith, 9 N. H. 285; Cary v. Bancroft, 14 Pick. 315; see Brooklyn Bk. v. De Grauw, 23 Wend. 342.

⁸ Foley v. Mason, 6 Md. 37.

⁹ Henwood v. Oliver, 1 Q. B. 409; Finch v. Miller, 5 C. B. 428.

¹⁰ *Supra*, §§ 869 *et seq.* 884; Wade's case, 5 Co. Rep. 114, a; Startup v. Macdonald, 6 M. & G. 593; City Bank v. Cutter, 3 Pick. 414; Dewy v. Humphrey, 5 Pick. 187; *aliter* in Connecticut, Tracy v. Strong, 2 Conn. 659. In Massachusetts by Gen. Stat. c. 130, §

been held to be the case with regard to negotiable paper. "A plea by the acceptor of a bill or the maker of a note, of a tender *post diem*, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always ready to pay, not only from the time of the tender, but also from the time when the bill or note became payable."¹—Tender by drawer or endorser must be immediately on receipt of notice of dishonor.² Tender of the amount due on a note payable on demand may be made at any time before its actual demand.³—Tender, also, may be made at any time of an indebtedness arising from money lent or goods sold on which there is no designated credit,⁴ or on a banker's account, or the account of a party with whom money is deposited.⁵—To a plea of tender it may be replied that the tender was too late;⁶ but the fact that the plaintiff had previously instructed an attorney to bring an action for the debt, and that process had been applied for, is no replication to a tender made before process issued;⁷ the defendant not being bound in such case for the cost of the writ or that of the attorney's letter.⁸—A tender of rent is good when made even on a late hour of the day when

23, a tender may be made at any time after maturity. See 2 Ch. on Cont. 11th Am. ed. 1190. That last limit as to time is allowed, see *infra*, §§ 884–5. As to cases in which time is of essence, see *supra*, § 887.

¹ *Hume v. Peploe*, 8 East, 168; *Poole v. Tunbridge*, 2 M. & W. 223; *City Bank v. Cutter*, 3 Pick. 414; *Dewey v. Humphreys*, 5 Pick. 187.

² *Leake*, 2d ed. 860; citing *Walker v. Barnes*, 5 Taunt. 240; *Siggers v. Lewis*, 1 C. M. & R. 370.

³ *Parke, B., Norton v. Ellam*, 2 M. & W. 461; *Cotton v. Goodwin*, 7 M. & W. 147.

⁴ *Ibid.*; *Kingston v. Kingston*, 11 M. & W. 233.

⁵ *Ibid.*; *Pott v. Clegg*, 16 M. & W. 321.

⁶ *Smith v. Manners*, 5 C. B. N. S. 632.

⁷ *Briggs v. Calverley*, 8 T. R. 629; *Moffat v. Parsons*, 5 Taunt. 307.

⁸ *Kirton v. Braithwaite*, 1 M. & W. 310; *Caine v. Coulton*, 1 H. & C. 764. See as to costs *supra*, § 972. In *Poole v. Tunbridge*, 2 M. & W. 223, *Parke, J.*, said: "It is also clearly settled that the meaning of a plea of tender is that the defendant was always ready to perform his engagement according to the nature of it, and did perform it as far as he was able, the other party refusing to receive the money. *Hume v. Peploe* is a decisive authority that the plea must state, not only that the defendant was ready to pay on the day of payment, but that he tendered on that day. This plea does not so state, and is therefore bad." See *Rose v. Brown, Kirby*, 295.

it becomes due,¹ and usually performance may be deferred to the last business hour of the day.² This rule has been, however, modified in many jurisdictions so as to sustain tenders when made on a day after the maturity of the debt, provided time was not of the essence of the contract.³—A tender before the maturity of a debt, when a debt draws interest, is defective;⁴ though it has been questioned whether, apart from the question of interest, a tender of payment of a debt before maturity is not good,⁵ and Mr. Parsons⁶ argues that “the courts of this country would, generally, hold a tender valid that was made before the debt was due, provided the debt did not draw interest, or if, when the debt did draw interest, the tender included interest to the maturity of the debt.” But this would put creditors to a great disadvantage, debts payable in future becoming virtually debts payable at the election of the debtor. Mortgagees, for instance, would pay off when interest fell, and hold on when interest rose; and securities payable at no matter how distant a date would really be payable at any time at the will of the debtor. That this is not the sense of the business community is illustrated by the fact that good six per cent. loans which a few years ago sold at par, are now (1882) selling at a premium of twenty per cent. That they could not be paid off before maturity, this premium shows.—The place of tender is usually the place of payment.⁷

§ 981. The plea of tender must aver not only a past tender, but a continued readiness to perform entirely the contract on which the suit is founded. It must aver that the defendant was always ready and still is ready to pay—*toujours prist*, and *uncore prist*. If the plaintiff can falsify the averment of *toujours prist* by showing that at any time after the maturity of the debt he demanded payment and was refused, he is entitled to suc-

Plea of tender must set forth constant readiness to pay.

¹ Thomas v. Hayden, 19 Vt. 589.

⁴ Saunders v. Frost, 5 Pick. 267;

² Savary v. Goe, 3 Wash. C. C. 140; Tillon v. Britton, 4 Halst. 120.

Aldrich v. Albee, 1 Greenl. 120; *supra*, §§ 884-5. See Gould v. Banks, 8

⁵ M'Hard v. Wheteroft, 3 H. & McH.

Wend. 562.

⁶ Cont. II. 642.

³ Tracy v. Strong, 2 Conn. 659.

⁷ As to tender on Sunday, see *infra*, § 990; *supra*, §§ 873, 897.

ceed.¹ But it is no sufficient reply to a plea of *toujours prist* that the plaintiff demanded a larger sum than that admitted to be due by the defendant, and that this demand was refused. That the defendant refused to pay a larger sum than was due does not show that he did not remain ready to pay that which was admitted to be due.²—The plea will be bad in substance if it does not allege an actual tender of the money, even though it could contain a *profert in curiam*.³ The plea, also, must contain a *profert in curiam* of the money tendered, and must be pleaded in bar of damages *ultra etc.*⁴

§ 982. Tender may be made as effectively to an agent duly authorized to represent the principal as it could be to the principal.⁵ Hence, tender to an attorney employed to bring suit, or to his clerk doing business for him, is sufficient.⁶ A promisee cannot by stratagem or evasion exclude a debtor from this right; and if a promisee intentionally keeps out of the way in order to avoid a tender, a tender on his nearest representative is sufficient.⁷ Tender may be as effectually made by an agent as it could be made by the principal,⁸ this being essential in all cases where the principal is not *sui juris*.⁹ When a debt is due to several joint creditors, a tender to one is sufficient;¹⁰ and so is a tender by one of several joint debtors.¹¹ To tender

Tender may be made to or by agent of joint creditor or debtor.

¹ Leake, 2d ed. 859; *Dixon v. Clark*, 5 C. & B. 377; *Cotton v. Godwin*, 7 M. & W. 147; *Hume v. Peploe*, 8 East, 168; *Carr v. Miner*, 92 Ill. 604; *Nixon v. Bullock*, 9 Yerg. 414; *Miller v. McClain*, 10 Yerg. 245; *Lanier v. Trigg*, 6 Sm. & M. 641; *Besancon v. Shirley*, 9 Sm. & M. 457.

² See *Dixon v. Clark*, 5 C. B. 378; *Thetford v. Hubbard*, 22 Vt. 440.

³ *French v. Watson*, 2 Wils. 74.

⁴ *Claffin v. Hawes*, 8 Mass. 261; *Carley v. Vance*, 17 Mass. 389; *Sheriden v. Smith*, 2 Hill, N. Y. 538; *Earle v. Earle*, 1 Harr. 273; *Crawford v. Harvey*, 1 Blackf. 383.

⁵ Wh. on Agency, § 207; *Goodland v. Blewith*, 1 Camp. 477; *Kirton v. Braithwaite*, 1 M. & W. 310; *Moffat*

v. Parsons, 5 Taunt. 307; *Kincaid v. Brunswick*, 2 Fairf. 188; *Hoyt v. Byrnes*, 2 Fairf. 475; *McNiffe v. Wheelock*, 1 Gray, 600; see *Renard v. Turner*, 42 Ala. 117; *Billiot v. Robinson*, 13 La. An. 529. That tender must be made personally, see *supra*, § 873.

⁶ *Crozer v. Pilling*, 4 B. & C. 28; *Kirton v. Braithwaite*, *ut supra*; *Hoyt v. Byrnes*, 2 Fairf. 475.

⁷ *Southworth v. Smith*, 7 Cush. 391.

⁸ *Read v. Goldring*, 2 M. & S. 86.

⁹ *Brown v. Dysinger*, 1 Rawle, 408.

¹⁰ *Dawson v. Ewing*, 16 S. & R. 371.

¹¹ *Douglas v. Patrick*, 3 T. R. 683; *Wallace v. Kelsall*, 7 M. & W. 264; *Gordan v. Ellis*, 7 M. & G. 607; *Brandon v. Scott*, 7 E. & B. 234; see *Oatman v. Walker*, 33 Me. 67.

by agent the same distinctions as to ratification apply as apply to other acts by agents.¹

§ 983. To give effect to a tender of money, there must be opportunity given to the creditor to inspect it. It will be sufficient to bring it in bags or other receptacles usual for carrying money, provided the creditor can open them readily and examine their contents; though it is otherwise with boxes, so locked or fastened that they cannot be readily examined.²

The creditor may waive inspection by refusing to look at the money tendered. It is his duty, not that of the debtor, to count the money.³ But unless the money be exhibited in package or bag, if not actually spread out to the eye, a mere statement by the debtor that he has the money with him is not made a sufficient tender by the declaration of the creditor that he will not receive it.⁴ On the other hand, the creditor who claims a larger amount, and on this ground repels a proffered tender, when the money is exhibited though only in package, cannot afterwards except to the non-production of the money.⁵ But it has been held a sufficient tender where the defendant, at her own house, offered to pay the plaintiff 10*l.*, saying she would go up-stairs and bring it, when the plaintiff said "she need not trouble herself, for he would not take it;"⁶ and so where the defendant said that he had the exact money in his pocket, and the creditor said "he need not

¹ *Harding v. Davies*, 2 C. & P. 78; *v. Little*, 7 N. H. 535; *Knight v. Ab-Reed v. Goldring*, 2 M. & S. 86.

² *Wade's case*, 5 Co. Rep. 114*a*; Co. Lit. 208*a*.

³ *Isherwood v. Whitmore*, 11 M. & W. 347; *Leatherdale v. Sweepstone*, 3 C. & P. 342; *Sargent v. Graham*, 5 N. H. 440; *Breed v. Hurd*, 6 Pick. 356; *Southworth v. Smith*, 7 Cush. 391; *Wheeler v. Knaggs*, 8 Ohio, 169; *Behaly v. Hatch*, Walker (Miss.) 369.

⁴ *Leake*, 2d ed. 863; *Glascott v. Day*, 5 Esp. 48; *Thomas v. Evans*, 10 East, 101; *Finch v. Brook*, 1 Bing. N. C. 253; *Blight v. Ashley*, 2 Pet. C. C. 24; *Brown v. Gilmore*, 8 Greenl. 107; *Fuller*

v. Little, 7 N. H. 535; *Knight v. Ab-bott*, 30 Vt. 577; *Breed v. Hurd*, 6 Pick. 356; *Bakeman v. Pooler*, 15 Wend. 637; *Strong v. Blake*, 46 Barb. 227; *Wheeler v. Knaggs*, 8 Ohio, 169; *Englander v. Rogers*, 41 Cal. 420.

⁵ *Bayley, J.*, *Polglass v. Oliver*, 2 C. & J. 15. See *Ashburn v. Poulter*, 35 Conn. 553; *Brewer v. Fleming*, 51 Penn. St. 102; *Rudolph v. Wagner*, 36 Ala. 698.

⁶ *Harding v. Davies*, 2 C. & P. 77. See comments in *Benj. on Sales*, 3d Am. ed. § 714; *Sargent v. Graham*, 5 N. H. 440; *Breed v. Hurd*, 6 Pick. 356.

give himself the trouble of offering it, for he would not take it, as the matter was in the hands of his attorney;”¹ and where the defendant, without opening his hand, said that he had in it the money, and the plaintiff said he would not take it.²—A debtor cannot be precluded from the right of tender by either the artifice³ or the prohibition of the creditor; and it is enough, therefore, if the debtor does all he can towards paying the money, leaving the responsibility of non-acceptance with the plaintiff.—“The production of the money, and the actual offer of it to the creditor, is dispensed with, if the party is ready and willing to pay it, and is about to produce it, but is prevented from so doing by a declaration that he will not or cannot receive it.”⁴ But the mere bringing a party ready to pay the money as security is no tender unless the money be actually brought in and exhibited.⁵—If the creditor refuses to receive the tender, which is left with him, but afterwards declines to return it when sent for, this is equivalent to an acceptance.⁶

§ 984. Tender must be made in current coin, lawful in place of tender.⁷ The fact that a note is issued by a party does not make that note currency so far as concerns that party.⁸ Even to the

Tender must be in current coin, but this may be waived.

¹ *Douglas v. Patrick*, 3 T. R. 683. In *Leatherdale v. Sweepstone*, 3 C. & P. 342, where the defendant offered to pay the plaintiff, and put his hand in his pocket to bring out the money, but before it was exhibited the plaintiff left the room, Lord Tenterden held there was no tender. See to same general effect *Lockyer v. Jones*, Peake, 180 n. In *Finch v. Brook*, 1 Bing. N. C. 253, Vaughan, J., quoted Sir James Mansfield as saying that “great importance is attached to the production of money, as the sight of it might tempt the creditor to yield.”

² *Alexander v. Brown*, 1 C. & P. 288.

³ *Benj. on Sales*, 3d Am. ed. § 714; *Borden v. Borden*, 5 Mass. 67; *Gilmore v. Holt*, 4 Pick. 258; *Tasker v. Bartlett*, 5 Cush. 359; *Hazard v. Loring*,

10 Cush. 267; *Sands v. Lyon*, 18 Conn. 18; *Thorne v. Mosher*, 5 C. E. Green, 257.

⁴ *Bigelow, J., Hazard v. Loring*, 10 Cush. 267, citing *Barker v. Parkenhorn*, 2 Wash. C. C. 142; *Blight v. Ashley*, Peters C. C. 15.

⁵ *Blight v. Ashley*, 2 Pet. C. C. 24; *Fuller v. Little*, 7 N. H. 535; *Breed v. Hurd*, 6 Pick. 356; *Bakeman v. Pooler*, 15 Wend. 637.

⁶ *Rogers v. Rutter*, 11 Gray, 410.

⁷ *Co. Lit.* 207 b; *Leake*, 2d ed. 862; *Moody v. Mahurin*, 4 N. H. 296; *Coxe v. Bank*, 3 Halst. 172.

⁸ *Bellows v. Smith*, 9 N. H. 285; *Cary v. Bancroft*, 14 Pick. 315. See, however, *Foley v. Mason*, 6 Md. 37, and cases cited *supra*, § 786.

bank issuing notes, such notes cannot at common law be paid as cash.¹—In England, special statutes have been passed making Bank of England notes legal tenders as long as they are redeemed in coin. By statute, also, gold coins are legal tenders without limit; silver coins to an amount not exceeding forty shillings; bronze coins to an amount not exceeding one shilling.² In this country, the states are precluded by the constitution of the United States from passing legal tender acts. The act of congress making treasury notes of the United States government legal tenders has been held by a majority of the judges of the supreme court of the United States to be constitutional, as well as to debts incurred before the statute as to those incurred afterwards.³ The opinion of the court on this question, however, is stripped of much of its weight by the fact that on the first hearing, while the court was unanimous in affirming the constitutionality of the statute as to debts incurred after its passage, there was a majority affirming the unconstitutionality of the statute so far as concerns debts incurred before its passage; and that it was not until after the appointment of two new judges that a majority of one affirming the constitutionality of the statute was secured.—It is conceded that, when a debt is made explicitly payable in gold or silver, it must be so paid.⁴

§ 985. The objection to the character of the money must be specific, and may be waived by the creditor. Thus where a creditor, on a payment being tendered to him in bank-notes which are not a legal tender, objects, not to the character of the notes, but to the amount, this is a waiver of the objection to the character of the notes.⁵

¹ *Hallowell Bank v. Howard*, 13 Mass. 235; *Coxe v. Bank*, 3 Halst. 172; *supra*, § 786. But see *Northampton Bank v. Balliet*, 8 W. & S. 311.

² *Leake*, 2d ed. 864.

³ *Knox v. Lee*, 12 Wall. 457; *Par-ker v. Davies*, 12 Wallace, 461; see *Metrop. Bk. v. Van Dyck*, 27 N. Y. 400; *Verges v. Giboney*, 38 Mo. 458; *Van Husean v. Kanouse*, 13 Mich. 303.

⁴ *Butler v. Horwitz*, 7 Wall. 258; *Trebilcock v. Wilson*, 12 Wall. 687; *Indep. Ins. Co. v. Thomas*, 104 Mass. 192; *Rankin v. Demott*, 61 Penn. St. 263; *Vilhac v. Biven*, 28 Cal. 410; *O'Neil v. McKewn*, 1 S. C. 147. But see *Jones v. Smith*, 48 Barb. 552.

⁵ *Leake*, 2d ed. 864; *Polglass v. Oliver*, 2 C. & J. 15; *Jones v. Arthur*, 8 Dow. 442; *Steam Stoker Co. in re*, L. R. 19 Eq. 416; *Snow v. Perry*, 9 Pick. 542; *Warren v. Mains*, 7 Johns. 476.

If the objection be not specifically taken, bank-notes will be considered as a sufficient tender.¹ If required, however, the payment must be in currency.²

§ 986. Unless requested by the creditor, a debtor does not discharge his indebtedness by a cheque or post-office order, though it is otherwise if the creditor collects the money or loses the security. He may, however, refuse to receive it, or if he receive it, may retain it as collateral, without accepting it in liquidation.³ It has been held, however, in Maryland, that a tender of the creditor's own overdue notes is equivalent to a tender of currency;⁴ and this may be the law in those states in which a set-off may be used as a tender, but not elsewhere.⁵ At common law, the tender can only be made in currency.⁶

Cheque or other security is not a tender.

II. DISTINCTIVE RULE AS TO GOODS.

§ 987. A tender of goods, to be operative, must be made in such a way as to enable the creditor to see that the articles tendered are what he is really required to take.⁷ Hence, an offer to deliver in closed casks, in which it is alleged the goods are contained, but examination of which is refused, is not an adequate tender.⁸ The goods

Tender of goods must be specific.

¹ *Benj. on Sales*, 3d Am. ed. § 716; *payment by cheques*, see § 953; see *Caine v. Coulton*, 1 H. & C. 764; *Bank U. S. v. Bank of Georgia*, 10 Wheat. 333; *Snow v. Perry*, 9 Pick. 542; *Warren v. Mains*, 7 Johns. 476; *Brown v. Dysinger*, 1 Rawle, 408; *Towson v. Bank*, 6 Har. & J. 53; *Wheeler v. Knaggs*, 8 Ohio, 169; *Fosdick v. Van Husan*, 21 Mich. 567; *Seawell v. Henry*, 6 Ala. 226; *Williams v. Rorer*, 7 Mo. 556; *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Ball v. Stanley*, 5 Yerg. 197; *Noe v. Hodges*, 3 Humph. 162.

² *Moody v. Mahurin*, 4 N. H. 296; *Donaldson v. Benton*, 4 Dev. & B. 435.

³ *Hough v. May*, 4 Ad. & E. 954; *Gordon v. Strange*, 1 Ex. 477; *Grussy v. Schneider*, 50 How. Pr. 134; as to

⁴ *Foley v. Mason*, 6 Md. 37.

⁵ *Leake*, 2d ed. 865; *Searles v. Sadgrove*, 5 E. & B. 639; *Phillpotts v. Clifton*, 10 W. R. Ex. 135.

⁶ *Supra*, § 984.

⁷ *Veazy v. Harmony*, 7 Greenl. 91; *Bates v. Churchill*, 32 Me. 31; *Newton v. Galbraith*, 5 Johns. 119; *Barns v. Graham*, 4 Cow. 482. As to tender in rescission, see *supra*, § 285.

⁸ *Isherwood v. Whitmore*, 10 M. & W. 757.

must be specifically set apart by the debtor,¹ unless accepted *pro tanto*.²

§ 988. The rule already stated that a tender must be unconditional applies as fully to goods as to money.³ Hence, a tender of goods on condition that the creditor will cancel and deliver up the contract is inoperative.⁴

Must be unconditional
Goods must exactly correspond with description and be merchantable by local law

§ 989. As is elsewhere seen, the goods tendered must conform to the description in the contract,⁵ and must be merchantable by local law.⁶ But a substantial conformity is sufficient.⁷

§ 990. If a specific time and place be fixed for the delivery, it is a sufficient tender of the debt for the debtor to be present at the designated place and time with the thing to be delivered.⁸ If the creditor refuses to attend at such time and place, this, supposing the tender to be duly made, relieves the debtor from liability.⁹ If the place be not fixed, the debtor must seek out the creditor, and deliver to him personally, though to perform a home contract it will not be necessary for him to follow the creditor to a foreign state.¹⁰ When the contract provides that goods shall

If delivered at time and place fixed, this is sufficient.

¹ *Veazy v. Harmony*, 7 Greenl. 91; *Leballister v. Nash*, 24 Me. 316; *Bates v. Churchill*, 32 Me. 31; *Barney v. Bliss*, 1 D. Chip. 399; *Newton v. Galbraith*, 5 Johns. 119. A tender of part of the goods is inadequate. *Russell v. Nicoll*, 3 Wend. 112; *Roberts v. Beatty*, 2 Pen. & W. 67.

² *Ibid.*; *Vance v. Bloomer*, 20 Wend. 200; *Dula v. Cowles*, 2 Jones, N. C. 454.

³ See *supra*, § 977.

⁴ *Robinson v. Batchelder*, 4 N. H. 40.

⁵ See *supra*, §§ 898 *et seq.*

⁶ See *supra*, §§ 869 *et seq.*; and see, also, Wh. Conf. of L. §§ 334 *et seq.*

⁷ *Supra*, §§ 220, 607, 869. As to merchantability, see *supra*, § 223.

⁸ *Supra*, §§ 871 *et seq.*; *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C.

531; *Savary v. Goe*, 3 Wash. C. C. 140; *Gilmore v. Holt*, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 391; *Case v. Greene*, 5 Watts, 262; *Zinn v. Rowley*, 4 Barr, 169; see *Haynes v. Thom*, 28 N. H. 400; *Curtiss v. Greenbanks*, 24 Vt. 536; *Miles v. Roberts*, 34 N. H. 245.

⁹ *Robbins v. Luce*, 4 Mass. 474; *Jewett v. Bacon*, 6 Mass. 60; *Lamb v. Lathrop*, 13 Wend. 95.

¹⁰ *Supra*, §§ 872-3; *infra*, § 991; Co. Litt. 210 a; *Leake*, 2d ed. 853; *Cranley v. Hillery*, 2 M. & S. 120; *Allshouse v. Ramsay*, 6 Whart. 331; *Howard v. Miner*, 20 Me. 325; *Smith v. Smith*, 2 Hill, 351. Mr. Greenleaf (Ev. § 611) doubts whether, when the creditor is out of the state, the debtor has a right to fix a place of delivery. See on this point *supra*, §§ 872, 873; *infra*, § 991.

be delivered on a particular time at a particular place, conformity with this is sufficient;¹ and the delivery of the goods at that time and place relieves the debtor from further duty in this relation;² and this, even though no one be present to receive the tender.³ But it is elsewhere held, that a plea to be good under such circumstances, must aver that the defendant was always ready to deliver the goods.⁴—The *time* of tender has been independently considered.⁵—Where the place of delivery is to be designated by the vendee, a tender is not required on part of the vendor before action to recover the purchase-money; readiness and an offer to deliver are enough.⁶—When the contract is silent as to place, the “store of the merchant, the shop of the manufacturer or mechanic, and the farm, barn, or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made.”⁷ If a tender of specific goods be not on the day appointed, the promisor is liable to a suit without demand.⁸—Parol evidence is admissible to show what was the place of delivery agreed upon by the parties, such incident being collateral to the contract.⁹ When the day of payment falls on Sunday, a tender on the

¹ *Supra*, §§ 871 *et seq.*

² *Smith v. Loomis*, 7 Conn. 110, and see cases cited *supra*, § 871.

³ *Gilmore v. Holt*, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 391; *Case v. Green*, 5 Watts, 262; *Smith v. Loomis*, 7 Conn. 110.

⁴ *Nixon v. Bullock*, 9 Yerg. 414; *Miller v. McClain*, 10 Yerg. 245; see *Roberts v. Beatty*, 2 Pen. & W. 63.

⁵ *Supra*, § 980.

⁶ *Hunter v. Wetsell*, 84 N. Y. 549.

⁷ 2 Ch. on Cont. 11th Am. ed. 1201, citing *Dunn v. Marston*, 34 Me. 379; *Miles v. Roberts*, 34 N. H. 245; *McKillip v. McKillip*, 8 Barb. 552; *Lobdell v. Hopkins*, 5 Cow. 518; *Vance v. Bloomer*, 20 Wend. 196; *Rice v. Churchill*, 2 Denio, 145; *Barr v. Myers*, 3 W. & S. 295; *Boswent v. Frankberger*, 15 Ill. 508; see *supra*, § 871, for other cases.

⁸ *Aldrich v. Albee*, 1 Greenl. 120; *Grieve v. Annin*, 1 Halst. 461; *Hamilton v. Eller*, 11 Ired. 276; *Mingus v. Pritchett*, 3 Dev. 78; *Sorrell v. Craig*, 8 Ala. 566; *supra*, § 881. As to demand see, further, *supra*, §§ 575, 616. See to same effect *Brown v. Berry*, 14 N. H. 459; *Gilman v. Moore*, 14 Vt. 457; *Bronson v. Wiman*, 4 Selden, 182. In *Appleton v. Hogan*, 9 B. Mon. 69, V. was shown to have agreed to deliver to P. a boat load of corn at Louisville as soon as the water permitted the boat to land. The place of delivery under such circumstances was held to be V.'s boat.

⁹ *Supra*, §§ 660–1, 910; Wh. on Ev. §§ 969, 1026; *Wyman v. Winslow*, 2 Fairf. 398; *Miles v. Roberts*, 34 N. H. 245; *Musselman v. Stoner*, 31 Penn. St. 265.

succeeding Monday is sufficient.¹—When the tender is complete in accordance with the contract, and is specific, the prevalent opinion, as we will see, is that the title in the goods rests in the creditor, and he may maintain trover for them.²

§ 991. Where the time of tender is not designated by the contract, it is incumbent, as we will presently see, on the party on whom the right of appointing the place falls, to give reasonable notice of the place designated, so that the other party can be in attendance.³ If there be no such notice, and if there is no demand by the party entitled to the goods, then the other party is not in default by omitting to tender them.⁴ And a designation of place is required in all cases in which the contract leaves the place open.⁵ While, as we have already seen, the debtor, in order to make a tender, is not required to follow the creditor into a foreign state,⁶ the fact that the creditor lives in a foreign country does not relieve the debtor from the duty of applying to him for instructions as to the place of delivery, or, if no such instructions are given, of notifying him of a proposed tender.⁷ But when a contract made in one state is to be performed in the same state, the promisor is not required to perform the contract in a foreign state to which the promisee may have moved.⁸

§ 992. We have already seen that when no place is designated for the performance of a contract, the place of performance is to be inferred from the contract, taking into consideration all the pertinent extrinsic facts.⁹ It has also been seen that articles difficult

¹ *Supra*, § 897.

² Ch. on Cont. 11th Am. ed. 1211; *Leballister v. Nash*, 24 Me. 316; *Curtiss v. Greenbanks*, 24 Vt. 536; *Smith v. Loomis*, 7 Conn. 110; *Nichols v. Whiting*, 1 Root, 443; *Des Arts v. Leggett*, 16 N. Y. 582; see *Wynau v. Winslow*, 2 Fairf. 398; *infra*, § 993.

³ *Howard v. Miner*, 20 Me. 325.

⁴ *Sergeant, J., Barr v. Myers*, 3 W. & S. 299.

⁵ *Chase v. Flanders*, 2 N. H. 417.

⁶ *Supra*, §§ 872–3, 990; *Howard v. Miner*, 20 Me. 325; *Bixby v. Whitney*, 5 Greenl. 192; *Smith v. Smith*, 25 Wend. 405; and cases cited *supra*, § 990.

⁷ *Bixby v. Whitney*, 5 Greenl. 192; *White v. Perley*, 15 Me. 470.

⁸ *Allshouse v. Ramsay*, 6 Wheat. 331; see *supra*, §§ 873, 990.

⁹ See *supra*, § 871.

to move are, as a rule, to be delivered at the place where they were deposited at the time of sale.¹ In other cases it is incumbent on the debtor, if desirous of making a tender, to seek the creditor, if within the state, and request him to fix the place for delivery. At this place the tender should be made, if the goods are not too cumbrous to be moved.² If the creditor refuses to appoint a place, or appoints an unsuitable place, the debtor may designate the place for delivery; and in this place, if suitable, tender may, after due notice, be made.³

§ 993. If a creditor to whom a tender of specific articles is made in performance of a contract refuses to receive the articles, while it is agreed that the contract is discharged by the tender, it has been doubted whether he obtains any title to the goods.—In a New Hampshire case it is insisted with much ability that no title passes by such a tender, though the contract is discharged.⁴ But the weight of authority is to the effect that a tender of goods, in pursuance of a contract, vests the property in the creditor, though he was absent at the time and did not accept the goods.⁵ Even if the debtor in such cases retains the goods, he does so, it is said, as the bailee of the creditor.⁶—And if the contract requires the vendor to deliver the goods at a particular time and place, the performance of these conditions vests the title in the purchaser.⁷

Tender of goods may transfer title.

§ 994. A tender may not merely be a mode of stopping

¹ *Supra*, § 872.

² *Bixby v. Whitney*, 5 Greenl. 192; *Howard v. Miner*, 20 Me. 325; *Goodwin v. Holbrook*, 4 Wend. 377; *Barr v. Myers*, 3 W. & S. 299; *Musselman v. Stoner*, 31 Penn. St. 265; *Mingus v. Pritchett*, 3 Dev. 78.

³ *Ibid.*; 2 Greenl. on Ev. § 610; *Aldrich v. Albee*, 1 Greenl. 120; *Miles v. Roberts*, 34 N. H. 245.

⁴ *Weld v. Hadley*, 1 N. H. 295.

⁵ 1 Swift's Sys. 404; *Smith v. Loomis*, 7 Conn. 110; *Slingerland v. Morse*, 8 Johns. 474; and other cases cited *supra*, § 990.

⁶ Story on Cont. § 1412; 2 Kent Com. Lect. 39, p. 509; *Lamb v. Lathrop*, 13 Wend. 95.

⁷ *Benj. on Sales*, 3d Am. ed. §§ 682 *et seq.* In *Wheelock v. Tanver*, 39 N. Y. 481, it was held that when a payment was to be made by the delivery of certain wagons, and the promisee was not ready to receive them at the time appointed, and they were consequently kept at his request by the promisor, a further tender of the wagons was unnecessary.

Tender may be a pre-requisite to establish a duty. further increment of a debt, but it may be a pre-requisite to establishing a duty. Thus a tender to a common carrier of a reasonable compensation may be necessary in order to impose on him a duty to carry a particular person or thing.¹ And on a tender of the amount due on a pledge, trover may be maintained by the pledgor if the pledgee refuses to restore.²

§ 995. To a party who declares he will not be bound by a contract, it is not necessary that a tender should be made.³ The general principle is that a party cannot defend himself on the ground of the non-performance on the other side of conditions whose performance he had already notified the other party would have been nugatory. If he declares himself not bound by the contract, or has incapacitated himself for its performance, he cannot set up failure in either demand or tender.⁴ "Where the vendor, before the time for the performance of his contract of sale, has disabled himself from performing his contract, neither a demand for performance, nor a tender of the consideration money, nor an averment of the plaintiff's readiness to accept the goods and pay for them, is necessary."⁵ "A party can only be obliged to make a tender when by making it he could obtain possession of the goods."⁶

¹ Harris v. Packwood, 3 Taunt. 264. See *supra*, §§ 582, 601 *et seq.*

² Walter v. Smith, 5 B. & Ald. 439; Parks v. Hall, 2 Pick. 206.

³ Gerrish v. Norris, 9 Cush. 167; Carpenter v. Holcomb, 105 Mass. 280; Curtis v. Aspinwall, 114 Mass. 187; Galvin v. Collins, 128 Mass. 527; *supra*, §§ 575 *et seq.*, 603.

⁴ *Supra*, §§ 312, 325, 603, 716, 747, 901.

⁵ Depue, J., Parker v. Pettit, 43 N. J. L. 517; citing Bowdell v. Parsons, 10 East, 359; Lovelock v. Franklyn, 8 Q. B. 371.

⁶ Lyndhurst, C. B., Jones v. Cliff, 1 C. & M. 541; and see cases *supra*, §§ 604-6.

CHAPTER XXXI.

ACCORD AND SATISFACTION.

Accord and satisfaction is agreement to accept in satisfaction for a debt something received, § 996.	An agreement to take a lesser amount secured is an accord and satisfaction when security is received, § 1003.
Acceptance of less amount is no satisfaction without release, § 997.	Acceptance of third party as security amounts to novation, § 1004.
Accord and satisfaction with one joint creditor or debtor releases all, § 998.	When other creditors release, composition may be accord and satisfaction, § 1005.
Accord without satisfaction no bar, § 999.	Goods or labor may be taken in satisfaction, § 1006.
Unliquidated debt for larger amount may be discharged on receipt of smaller amount in cash, § 1000.	Part payment by judgment and execution may satisfy, § 1007.
Any additional weight turns the scale, § 1001.	Payment by a stranger may be accord and satisfaction, § 1008.
Anticipation of time or change of place may be sufficient, § 1002.	

§ 996. ACCORD and satisfaction is an agreement to accept in satisfaction of a debt something at the time received.¹

The accord is the agreement for the reception of the thing in discharge of the debt; the satisfaction is the actual reception of the thing. Upon this satisfaction the creditor's right of action is extinguished; and written promises can be extinguished by this process as effectually as unwritten.² A distinction at common law, however, exists between sealed and unsealed instruments. The tenor of the former can only be varied, at common law, so as to introduce a new mode of satisfaction,

Accord and satisfaction is agreement to accept in satisfaction of a debt something at the time received.

¹ Bac. Abr., Accord; Com. Dig., Ac. and Sat.; Kaye v. Waghorn, 1 Taunt. 428. See *supra*, § 504.

² Smith v. Trowsdale, 3 E. & B. 83; M'Kellar v. Wallace, 8 Moore P. C. 378; Drake v. Mitchell, 3 East, 251; Edwards v. Chapman, 1 M. & W. 231; Anderson v. Turnpike Co., 16 Johns. 86.

by a writing under seal;¹ and hence it is held that "accord and satisfaction is no bar to an action for a debt covenanted to be paid."²—On the other hand, accord and satisfaction has been held a good plea to an action for breach of a covenant to repair, the action not being to enforce the covenant, but to claim damages for its non-fulfilment by the covenantor.³ And the distinction between sealed and unsealed instruments does not obtain in equity, nor in those systems in which equity is absorbed in the common law.⁴—Accord and satisfaction, being a matter of extrinsic settlement, may be proved by parol.⁵—The settlement, to be operative, must be immediate; an agreement to settle at a future time cannot be an accord and satisfaction.⁶—As to the thing received, an important distinction is to be observed. This thing may consist in money or labor or goods actually at the time delivered,⁷ or in a substantive security (*e. g.*, negotiable paper, or other independent engage-

¹ Blake's case, 6 Rep. 44. See as to sealed documents, *supra*, § 680.

² Massey v. Johnson, 1 Ex. 253, cited Leake, 2d ed. 877.

At common law, a liability on contracts under seal could not "be discharged by a mere license not under seal even for a valuable consideration, or even by accord and satisfaction before breach (Smith's L. C. 7th Am. ed. 603, citing Berwick v. Oswald, 1 E. & B. 295; Spence v. Healey, 8 Exch. 668); and after breach, those claims arising out of them which sounded in damages, and not debts accruing by the execution of the deed only, could be the subject of accord and satisfaction." Blake's case, 6 Rep. 44; Selw. N. P. "Covenant," vii. 1. The present practice is stated in other sections. *Infra*, § 1032; *supra*, §§ 684 *et seq.*

That there may be parol novation of sealed contracts, see *supra*, §§ 852 *et seq.*

That debts secured by instruments under seal may be barred by accord and satisfaction, see Jones v. Ransom,

3 Ind. 327, and see 7 Smith's L. C. 7th Am. ed. 697. "A parol accord and satisfaction cannot discharge the instrument, but may discharge the money due upon it." *Ibid.*, citing Strang v. Holmes, 7 Cow. 225. "Upon the same distinction it is that accord and satisfaction before breach, without release of deed, is no bar to an action of covenant; but after breach, it is of the damages." *Ibid.*, citing note to 6 M. & Gr. 262; Harper v. Hampton, 1 Har. & J. 622; Smith v. Brown, 3 Hawks. 580; Cabe v. Jameson, 10 Ired. 193.

³ Blake's case, 6 Rep. 44.

⁴ Leake, 2d ed. 378; citing Binns v. Fisher, 43 L. J. C. 188. See Coit v. Houston, 3 Johns. Ca. 243; *infra*, § 1032. As to distinction between sealed and unsealed contracts, see *supra*, § 684.

⁵ Lavery v. Turley, 6 H. & N. 239; Massey v. Johnson, 1 Ex. 241; Wh. on Ev. §§ 77, 1017.

⁶ *Infra*, § 999.

⁷ *Infra*, § 1006.

ment) for indebtedness. The latter case is virtually one of novation, as it is the acceptance of a new contract in place of an old contract which is superseded.¹ Hence, "an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance."² In such case, however, the accord must have been accepted in satisfaction.³ But unless there be a new consideration, such substitution is not operative.⁴ "Upon the whole," says Mr. Chitty, "the true distinction would seem to be, between cases in which the plaintiff has agreed to accept the promise of the defendant in satisfaction, and those in which he has agreed to accept the performance of such promise in satisfaction; the rule being that in the latter case there shall be no satisfaction without performance; whilst in the former, if the promise be not performed, the plaintiff's only remedy is by action for the breach thereof, and he has no right to recur to the original demand."⁵

¹ See *supra*, §§ 852 *et seq.* That it may be proved by parol, see Wh. on Ev. § 1017.

² Com. Dig. Accord, B., adopted in Ch. on Con. 11th Am. ed. 1122, as cited by Peake, J., in *Good v. Cheeseman*, 2 B. & Ad. 335; and per cur. *Cartwright v. Cooke*, 3 B. & Ad. 702. To the same effect are cited *Woodward v. Miles*, 24 N. H. 289; *Babcock v. Hawkins*, 23 Vt. 561; *Billings v. Vanderbeck*, 23 Barb. 546; *Perkins v. Lockwood*, 100 Mass. 249.—This distinction is adopted by Storrs, J., in *Goodrich v. Stanley*, 24 Conn. 613, who, after quoting the extract above given from Comyn, adds: "the meaning of which is, that an acceptance, in satisfaction of a debt, of an accord or agreement, with mutual promises to perform, on which the party has a legal remedy for its non-performance, is a good satisfaction of such debt, although such promises are not performed. . . . There must be a valid agreement, substituting a new cause of action in place of the old. It

is not sufficient that there is a mere accord between the same parties, with mutual promises, but there must be a new agreement with a new consideration. Although this doctrine, well established in the English cases, appears to have been regarded with disfavor in some of the courts of this country, we do not perceive why, on principle, an acceptance of a new and valid promise, which can be enforced in substitution of an existing claim, should not be held to be as effectual a satisfaction and extinguishment of such claim as the acceptance of any other thing."

³ *Flockton v. Hall*, 14 Q. B. 380; *Hall v. Flockton*, 16 Q. B. 1039.

⁴ *Supra*, §§ 852 *et seq.* As to release, see *infra*, §§ 1031 *et seq.*

⁵ Ch. on Con. 11th Am. ed. 1124, citing *Evans v. Powis*, 1 Exch. 601; *Sard v. Rhodes*, 1 M. & W. 153; *Good v. Cheeseman*, 2 B. & Ad. 328. To the same effect is *Babcock v. Hawkins*, 23 Vt. 561; *Ranlett v. Moore*, 21 N. H. 336; *Woodward v. Miles*, 24 N. H. 289.

§ 997. An acceptance of an amount less than a debt cannot operate as a discharge of the debt unless there be a sealed release of the residue, or some additional consideration as an equipoise to the residue released. The rule is that payment of a less sum in satisfaction of a greater debt at the time liquidated, only discharges *pro tanto*;¹ and, although with occasional doubts as to the reasonableness of the position, it is held in many cases that

Acceptance of less amount is no satisfaction without a release.

And see for other cases *supra*, §§ 852-3; *Norris v. U. S.*, 14 Ct. of Cl. 354; *Murphy v. U. S.*, 14 Ct. of Cl. 508.

¹ *Supra*, §§ 494, 504, 935; *Pownal's* case, 5 Co. 117a; *Cumber v. Wane*, 1 Strange, 426; *Smith's L. C.* 7th Am. ed. 595 *et seq.*; *Down v. Hatcher*, 10 A. & E. 121; *Mitchell v. Cragg*, 10 M. & W. 367; *Orme v. Golloway*, 7 Ex. 544; *Gifford v. Whittaker*, 6 Q. B. 249; *Baillie v. Moore*, 8 Q. B. 489; *Bailey v. Day*, 26 Me. 88; *White v. Jordan*, 27 Mr. 370; *Goodwin v. Follett*, 25 Vt. 386; *Harriman v. Harriman*, 12 Gray, 341; *Warren v. Hodge*, 121 Mass. 106; *Warren v. Skinner*, 20 Conn. 559; *Pahodie v. King*, 12 Johns. 426; *Bunge v. Koop*, 48 N. J. 225; *Ryan v. Ward*, 48 N. Y. 204; *Watts v. French*, 19 N. J. Eq. 407; *Rising v. Patterson*, 5 Whart. 316; *Jones v. Ricketts*, 7 Md. 108; *Hardey v. Coe*, 5 Gill, 189; *McKenzie v. Culbreth*, 66 N. C. L. 534; *Eve v. Moseley*, 2 Strobb. 203; *Pearson v. Thomason*, 15 Ala. 700; *Vance v. Lukenbill*, 9 B. Mon. 249; *Bryan v. Brazil*, 52 Iowa, 350; *Lankton v. Stewart*, 27 Minn. 346; see *Clifton v. Litchfield*, 106 Mass. 34. For other cases, see *supra*, §§ 494, 504.

In *Cumber v. Wane*, 1 Str. 426, it was held that giving a note for 5*l.* is not a satisfaction for 15*l.* The decision has since been followed by innumerable cases, though the reason of *Pratt, C. J.*, that the satisfaction "must appear to the court to be reasonable," "or at

least the contrary must not appear, as it does in this case," is no longer regarded as good, since it is now agreed on all sides that the courts will not judge of the sufficiency of a consideration. *Supra*, § 517. In the *London Law Times* for May 6, 1882, we have the following: "It is really time that the old rule in *Cumber v. Wane*, 1 Str. 425; 1 *Smith L. C.* 7th edit. 341, was abolished. Mr. Pollock speaks of the rule having committed the English law to 'an absurd paradox.' In *Sibree v. Tripp*, 15 M. & W. 23, that case was 'considered,' and the court, as it could not overrule it, declared that the facts were not sufficiently stated to make it a binding authority. In *Godard v. O'Brien*, which will be found in our reports of last week, 46 L. T. N. S. 306; L. R. 9 Q. B. D. 39, Mr. Justice Grove declared that *Cumber v. Wane* 'was entitled to every respect, although we may not see the reason on which it is founded.' Of course he distinguished the case before him from that respectable, but unreasonable, old case. Surely this needs legislation." *Fitch v. Sutton*, 5 East, 230, put the question on a firmer basis. The suit was *indebitatus assumpsit* for goods sold and delivered. The defendant, it appeared, owed the plaintiff 50*l.*, and compounded with his creditors, paying them seven shillings in the pound, and at the time of such payment to the plaintiff, to adopt Mr. Smith's

at common law, the payment of a smaller sum, without a release under seal, or without some additional consideration as hereinafter noticed, is no satisfaction of the claim for the entire amount, though there is a receipt in full.¹ "The payment of part of an acknowledged debt after its maturity has often been held to be no sufficient consideration for a release, not under seal, of the remainder. It has no effect as an accord and satisfaction, and rests upon no legal or valid consideration."²

summary, promised to pay him the residue of his debt, when he should be of ability so to do, which he was proved to have been before this action was brought. On the other hand, the defendant produced a receipt signed by the plaintiff, for the composition, and which purported to be in full of all demands. And it was urged that the receipt was either a discharge of the promise, or that the promise itself was void, as being a fraud upon his other creditors, or that at all events, the plaintiff ought not to have declared upon the original cause of action, but specially upon the new promise to pay when of ability. But the court *in banc*, after a verdict for the defendant, made a rule for a new trial absolute on the express grounds that the acceptance of 19l. 10s. could not be a satisfaction for a debt of 50l. "There must be some consideration," said Lord Ellenborough, "for the relinquishment of the residue, something collateral to show the possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*. But the mere promise to pay the rest, when of ability, puts the plaintiff in no better condition than he was before." *Cumber v. Wane* was then referred to as authoritative. To the same effect are cited *Heathcote v. Crookbanks*, 2 T. R. 24; *Lynn v. Bruce*, 2 H. Bl. 317; *Mitchell v. Cragg*, 10 M. & W. 367; and see in further recognition of

same principle, *Latapee v. Pecholier*, 2 Wash. C. C. 180; *Dederick v. Leman*, 9 Johns. 333; *Seymour v. Minturn*, 17 Johns. 169; *Moss v. Shannon*, 1 Hilt. 177; *Curtiss v. Martin*, 20 Ill. 575. That the rule is artificial and that any additional element of consideration will validate such a settlement, see *infra*, § 1001. As to Maine statute, see *Weymouth v. Babcock*, 42 Me. 44.

¹ *Down v. Hatcher*, 10 A. & E. 121; *Lewis v. Jones*, 4 B. & C. 513; *White v. Jordan*, 27 Me. 370; *Lee v. Oppenheimer*, 32 Me. 254; *Wheeler v. Wheeler*, 11 Vt. 60; *Twitchell v. Shaw*, 10 Cush. 48; *Tuttle v. Tuttle*, 12 Met. 551; *Harriman v. Harriman*, 12 Gray, 341; *Grinnell v. Spink*, 128 Mass. 25; *Dederick v. Leman*, 9 Johns. 333; *Seymour v. Minturn*, 17 Johns. 169; *Geiser v. Kershner* 4 Gill & J. 305; *Eve v. Moseley*, 2 Strobh. 203; and cases cited in former notes to this section and to §§ 494, 504, 935.

² *Ames, J., Lathrop v. Page*, 129 Mass. 21, citing *Harriman v. Harriman*, 12 Gray, 341; *Jennings v. Chase*, 10 Allen, 526. In *Miller v. Hatch*, 72 Me. 481, the cases are thus reviewed by Appleton, C. J. "In *Clifton v. Litchfield*, 106 Mass. 34, it was held that an executory contract, by way of compromise to discharge a disputed, unliquidated claim, by the giving of the debtor's promissory note, for a sum less than the amount actually due, was not a bar to a suit upon the original de-

§ 998. Where one of several parties jointly liable makes an accord and satisfaction with the common creditor for the common debt, this discharges the debt as to all the debtors;¹ though a partial payment does not work a bar.² When one of several joint creditors makes an accord and satisfaction with the common debtor, this discharges the debt as to all the creditors.³

§ 999. An accord without satisfaction is no bar. It is merely an agreement to do something in future, which, until done, cannot be regarded as extinguishing the right of action. The accord, to be a bar, must be executed before the action brought.⁴ The accord is a mere negotiation until satisfaction takes place, and the creditor can, until satisfaction, withdraw his acceptance at any time before the satisfaction is received.⁵ Hence an accord to

mand, although the note has been tendered the creditor, if it has not been accepted. In *Blake v. Blake*, 110 Mass. 202, the agreement was under seal. 'The agreement,' observes Wells, J., 'to accept a part in satisfaction of the whole, so long as it remains executory, will not operate either as payment, satisfaction, or discharge.' In *Cushing v. Wyman*, 44 Me. 121, the question here presented was fully examined and considered, and it was then held that an executory agreement constituted no bar to a suit."

¹ *Supra*, §§ 831, 998; *Nicholson v. Revill*, 4 A. & E. 675; *Barrett v. R. R.*, 45 N. Y. 628; *Milliken v. Brown*, 1 Rawle, 391; see *Strang v. Holmes*, 7 Cow. 224.

² *Smith v. Bartholomew*, 1 Met. 276; *Warren v. Skinner*, 20 Conn. 559. That the acceptance of negotiable paper from a partner discharges the debt, when accepted in full payment, see *Thompson v. Percival*, 5 B. & Ad. 925; *Therasson v. Peterson*, 3 Keys, 636. That the acceptance of a fractional sum from one debtor does not bar the debt, the object being to release him, see *Smith v. Bartholomew*, 1 Metc. (Mass.)

276; *contra*, *Milliken v. Brown*, 1 Rawle, 391; *supra*, §§ 831, 949.

³ *Supra*, §§ 821, 950; *Wallace v. Kelsall*, 7 M. & W. 264; *Clark v. Dinsmore*, 5 N. H. 136; see *Milliken v. Brown*, 1 Rawle, 391.

⁴ *Smith's L. C.* 7th Am. ed. 601; 2 Ch. on Cont. 11th Am. ed. 1101; *Leake*, 2d ed. 879; *Cooper v. Parker*, 15 C. B. 822; *Bayley v. Homan*, 3 Bing. N. C. 920; *Brown v. Perkins*, 1 Hare, 564; *Gabriel v. Dresser*, 15 C. B. 622; *Collingbourne v. Mantell*, 5 M. & W. 292; *Warren v. Skinner*, 20 Conn. 559; *Smith v. Bartholomew*, 1 Met. 276; *Russell v. Lytle*, 6 Wend. 390; *Brooklyn Bk. v. De Grauw*, 23 Wend. 342; *Anderson v. Turnpike Co.*, 16 Johns. 86; *Keeler v. Neal*, 2 Watts, 424; *Sprunberger v. Dentler*, 4 Watts, 126; *Frost v. Johnson*, 8 Ohio, 393; *Woodruff v. Dobbins*, 7 Blackf. 582; *Ballard v. Nooks*, 2 Pike, 45; *Simmons v. Hamilton*, 56 Cal. 493.

⁵ *Allen v. Harris*, 1 Ld. Ray. 122; *Reeves v. Hearne*, 1 M. & W. 323; *Massey v. Johnson*, 1 Ex. 256; *Cushing v. Wyman*, 44 Me. 121; *White v. Gray*, 68 Me. 579; *Woodward v. Miles*, 24

accept goods in place of goods agreed to be delivered to the plaintiff is no bar in an action for breach of contract, unless the goods were delivered and accepted, or unless the defendant was misled by the plaintiff's conduct, or unless there was a novation.¹ An agreement, also, to accept a mortgage as security for a debt is no bar to an action for the debt, unless the mortgage was at the time accepted, and the old contract be reconstructed on good consideration by novation.² It is no answer, also, to a suit on a note that the plaintiff agreed to receive payment by instalments, there being no part reception and consideration for delay.³—The plea must allege that the matter was accepted in satisfaction.⁴ Tender of satisfaction, after it is agreed upon, must be formally made and received, in order to be effective.⁵—It may be, however, that after an accord, the debtor may, on the faith of it, take steps which will preclude the creditor from disputing the adequacy of a tender of the thing agreed to be accepted in satisfaction.⁶ Or there may be, on sufficient consideration, a reconstruction of the entire contract, in which case the new contract takes the place of the old, by way of novation.⁷

§ 1000. A cash payment for a smaller amount may be an

N. H. 293; *Hearn v. Kiel*, 38 Penn. St. 149; *Flack v. Garland*, 8 Md. 191; *Simmons v. Clark*, 56 Ill. 96; *Hall v. Smith*, 10 Iowa, 48; *Logan v. Austin*, 1 Stew. (Ala.) 476; *Pope v. Tunstall*, 3 Pike, 209; *Overton v. Conner*, 50 Tex. 113. The satisfaction must be complete to bar a suit. *Cuxon v. Chadley*, 3 B. & C. 591; *Bragg v. Pierce*, 53 Me. 65; *Costello v. Cady*, 102 Mass. 140; *Kromer v. Heim*, 75 N. Y. 574; *Panzerbeiter v. Waydell*, 21 Hun, 161; *Spruneberger v. Dentler*, 4 Watts, 126; *Ellis v. Bitzer*, 2 Ohio, 91. That accord without satisfaction is a mere inoperative agreement, see *Spence v. Heeley*, 8 Exch. 668; *Noe v. Christie*, 41 N. Y. 270; *Young v. Fugett*, 1 Lea (Tenn.) 444.

¹ *Gabriel v. Dresser*, 15 C. B. 622; *Wray v. Milestone*, 5 M. & W. 21; *Collingbourne v. Mantell*, 5 M. & W. 289; *Bruce v. Bruce*, 4 Dana, 530. As to novation, see *supra*, §§ 852 *et seq.*

² *Allies v. Probyn*, 2 C. M. & R. 408; but see *Kinsler v. Pope*, 5 Strobb. 126; *Morris Canal Co. v. Vanvorst*, 1 Zab. 101.

³ *McManus v. Bark*, L. R. 5 Ex. 65.

⁴ *Smith*, L. C. 7th Am. ed. 606; *Maze v. Miller*, 1 Wash. C. C. 328; *Morris Canal Co. v. Vanvorst*, 1 Zab. 101; *Sinard v. Patterson*, 3 Blackf. 354.

⁵ *Pettis v. Ray*, 12 R. I. 344.

⁶ *Keeler v. Salisbury*, 33 N. Y. 648.

⁷ See *supra*, §§ 852 *et seq.*

Unliquidated debt for larger amount may be discharged on receipt of smaller amount in cash.

accord and satisfaction for a larger unliquidated claim.¹ And an agreement by which a claim for unliquidated damages is suspended until the creditor does a particular act, operates to suspend such claim until such act is done.² An agreement, also, for mutual discontinuance of two cross suits for false imprisonment may operate as an accord and satisfaction.³

Any additional weight turns the scale.

§ 1001. While the rule still continues to be that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, yet it is now firmly settled that "if there be any benefit, or even legal possibility of a benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement."⁴ Thus, in a Connecticut case in 1880, a creditor, having brought suit on a debt of \$299, agreed, pending the litigation, to accept \$150 in full, together with the costs and expenses of the suit when ascertained. The

¹ *Supra*, §§ 521, 533, 937; Longridge v. Dorville, 5 B. & Ald. 117; Watters v. Smith, 2 B. & Ad. 889; Haigh v. Brookes, 10 A. & E. 309; Wilkinson v. Byers, 1 A. & E. 106; Palmerton v. Huxford, 4 Denio, 166; Howard v. Norton, 65 Barb. 161; McDaniels v. Lapham, 21 Vt. 223; McDaniels v. Bank, 29 Vt. 235; Donohue v. Woodbury, 6 Cush. 150; Lamb v. Goodwin, 10 Ired. 320; Mathis v. Bryson, 4 Jones, L. 508.

² *Stracy v. Bank*, 6 Bing. 754; *Wentworth v. Bullen*, 9 B. & C. 840.

³ *Foster v. Trull*, 12 Johns. 456; *supra*, §§ 198, 533.

⁴ *Smith's L. C.* 7th Am. ed. 600; citing *Steinman v. Magnus*, 2 Camp. 124; 11 East, 390; *Bradley v. Gregory*, 2 Camp. 383; *Wood v. Roberts*, 2 Stark. 417; *Boothby v. Sowden*, 3 Camp. 175; *Sibree v. Tripp*, 15 M. & W. 23; and other cases cited *supra*, §

517; see *Bailey v. Cowles*, 86 Ill. 333; *State v. Story*, 57 Miss. 738. In *Couldery v. Bartrum*, L. R. 19 Ch. D. 399, Jessel, M. R., thus comments on the common-law rule: "According to English common law, a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary, together with his 19s. 6d., there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English common law." See also *supra*, §§ 935 *et seq.*

debtor paid the \$150 and the costs, which ultimately turned out to be \$18.00. It was held that this latter item made a sufficient additional consideration to constitute a binding accord and satisfaction.¹ But the additional increment of consideration must be something appreciable.² Hence a promise by the debtor to do something he is already bound to do, will not form such additional consideration;³ nor will, in general, a merely cumulative promise.⁴ But if appreciable, no matter how slight it may be, the consideration will be sufficient to support the settlement. "The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts, therefore, have departed from it upon slight distinctions."⁵ Extension of time is always a good consideration.⁶

¹ *Mitchell v. Wheaton*, 46 Conn. 315.

² *Supra*, § 519; *Buddicum v. Kirke*, 3 Cranch, 293; *Keeler v. Neal*, 2 Watts, 424; *Davis v. Noakes*, 3 J. J. Marsh. 494.

³ *Supra*, §§ 500, 720.

⁴ *Supra*, § 498.

⁵ *Nelson, J., Kellogg v. Richards*, 14 Wend. 116; and in *Johnston v. Brannan*, 5 Johns. 271, the rule was spoken of as "rigid and unreasonable." See to same effect, comments of Dewey, J., in *Brooks v. White*, 2 Metc. 285; and in *Smith*, L. C. 7th Am. ed. 608. In *Harper v. Graham*, 20 Ohio, 105, the payment of an attorney's fee of \$100, was held to supply the necessary make-weight.

⁶ *Supra*, §§ 517 *et seq.*; *Wormer v. Waterloo Works*, 50 Iowa, 262. In *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37, it was held by Grove, J., and Huddleston, B., that a cheque paid and accepted in discharge of a debt for a larger amount is a good satisfaction and discharge of the whole debt. It was held by both judges, that *Cumber v. Wane*

had been overruled so far as concerns cases in which "any benefit, or even any legal possibility of benefit to the creditor is thrown in." And Cockburn, C. J., was quoted as saying in *Bridges v. Garrett*, L. R. 5 C. P. 451: "If, however, payment is made by cheque, and the cheque is duly honored, that is a payment in cash." In *Mechanics' Bank v. Huston*, 11 Weekly Notes, 389 (Sup. Ct. Penn. 1882), Sharswood, C. J., giving the opinion of the court, said: "It may be considered as now well settled in this state, that payment of part of an undisputed debt after it is due, though accepted in full, is not a good accord and satisfaction. *Wentz v. De Haven*, 1 S. & R. 312, which decided that in Pennsylvania, a mortgage may be released by a writing not under seal and without consideration, has been expressly overruled. *Whitehill v. Wilson*, 3 Penrose & Watts, 405; *Kennedy v. Ware*, 1 Barr, 445; *Kidder v. Kidder*, 9 Casey, 268. The opinion expressed in *Milliken v. Brown*, 1 Rawle, 397; and *Hall v. Warwick*, 2

§ 1002. The fact that a payment of a smaller sum is made in cash will add the increment of consideration which is requisite to sustain an accord and satisfaction.¹ Change of place of payment, also, may have the same effect.²

Anticipation of time or change of place may be sufficient.

American Law Journal, 186, must fall with *Wentz v. De Haven*. It is too clear for argument, that if a release of a debt not under seal must have a consideration to support it, then payment of part of an acknowledged indebtedness can be no consideration for a release of the remainder.

“While this is so it is equally well settled that the acceptance of a collateral thing, without regard to its value, is a good accord and satisfaction. In the absence of fraud the courts never inquire into the adequacy of the consideration, of an agreement. The promissory note of the debtor is such a collateral thing. It is a decided advantage to the creditor in two ways. First, the greater facility of a recovery upon it. It requires no evidence of consideration in the first instance. It imports *prima facie* a sufficient consideration. Second, it may be disposed of in the market at once before it falls due, and the *bona fide* purchaser of it takes it clear of all equities between the original parties. Thus the creditor may often find that such a note for part of his debt is of great and immediate advantage to him by raising the money upon it. *Cumber v. Waue*, 1 Strange, 426, is relied on as opposed to this. It is not stated in the facts, nor in the opinion of the court, that the note in that case was negotiable, though it is so spoken of in the argument of counsel. Indeed, Chief Justice Pratt says: ‘If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the

value?’ not adverting to any change in the nature of the security. Mr. Smith in his note on this case remarks that ‘the main point, viz., that a security of equal degree for a smaller sum, if it present no easier or better remedy, cannot be pleaded in an action for the larger one, has frequently been affirmed since the decision of *Cumber v. Waue*,’ where he evidently confines it to the case where the new security presents no easier or better remedy. He adds ‘that the doctrine laid down by Pratt, C. J., in delivering the judgment of the court, has not been to its full extent sustained.’ He refers then to some subsequent determinations, among them *Sibree v. Tripp*, 15 Mees. & Wels. 23, in which it was held that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount, the circumstance of negotiability making it in fact a different thing, and more advantageous than the original debt, which was not negotiable. 1 Smith’s Leading Cases, 440, 442. To the same effect is *Curlewis v. Clark*, 3 Exch. Rep. 375. The same principle was distinctly recognized in *Savage v. Everman*, 20 P. F. Smith, 315.”

¹ *Supra*, § 504; *Brown v. Stackpole*, 9 N. H. 478; *Austin v. Dorwin*, 21 Vt. 39; *Reed v. Bartlett*, 19 Pick. 273; *Brooks v. White*, 2 Metc. (Mass.) 283; *Rose v. Hall*, 26 Conn. 392; *Kellogg v. Richards*, 14 Wend. 116; *Milliken v. Brown*, 1 Rawle, 391; *Smith v. Brown*, 3 Hawks, 580; *Arnold v. Park*, 8 Bush, 3; *Spann v. Baltzell*, 1 Fla. 302.

² *Jones v. Perkins*, 29 Miss. 141.

§ 1003. An agreement by which a lesser sum, with additional security, is accepted in discharge of a prior debt, is an accord and satisfaction, and operates when the new security, being accepted as adequate, is received by the creditor. The consideration, in such case, is sufficient. The debtor obtains reduction and extension; the creditor obtains security which he did not before possess.¹ To constitute accord and satisfaction, however, the creditor must accept the new promise with its security; and if he refuses to do so, the original claim may be pursued.² It is here that the element of novation comes in. If a new contract takes the place of the old, the old, if the consideration be sufficient, is superseded by the new.³ But the mere agreement to take a less sum is on its face without consideration. If, however, a new security is proposed by the debtor and accepted by the creditor, this operates as a satisfaction when the agreement is that it should be so accepted.⁴ And it is hard to see why an agreement to take such a security, followed by a tender of the

An agreement to take a lesser amount secured is an accord and satisfaction when security is received.

¹ *Supra*, §§ 574, 953 *et seq.*; *Sibree v. Tripp*, 15 M. & W. 23; 1 Smith's Lead. Cas. *444; *Hinckley v. Arey*, 27 Me. 362; *Billings v. Vanderbeck*, 23 Barb. 546; *Douglass v. White*, 3 Barb. Ch. 621; *Kellogg v. Richards*, 14 Wend. 118; *Frisbie v. Larned*, 21 Wend. 450; *Reid v. Hibbard*, 6 Wis. 175; *Mason v. Campbell*, 27 Minn. 54; *Sanders v. Bank*, 13 Ala. 353; *Pope v. Tunstall*, 3 Pike, 209. See discussion in 1 Smith's L. C. 7th Am. ed. 598 *et seq.*

² Story on Cont. § 982 *b*; 2 Parsons on Cont. 681-3; *Russell v. Lytle*, 6 Wend. 390; *Hawley v. Foote*, 19 Wend. 516; *Kromer v. Heim*, 75 N. Y. 574; *Hearn v. Kiehl*, 38 Penn. St. 147; *Keen v. Vaughan*, 48 Penn. St. 477. See *Young v. Jones*, 64 Me. 563; *White v. Gray*, 68 Me. 579; *Pettis v. Ray*, 12 R. I. 344; *Frost v. Johnson*, 8 Ohio, 393.

That acceptance as a full discharge of a promissory note or endorsement of a

third person, even for a less sum, may constitute accord and satisfaction, see 1 Smith's L. C. 7th Am. ed. 605; *Brooks v. White*, 2 Metc. 283; *Boyd v. Hitchcock*, 20 Johns. 76; *Booth v. Smith*, 3 Wend. 66; *New York State Bank v. Fletcher*, 5 Wend. 85; *Kellogg v. Richards*, 14 Wend. 116; *Frisbie v. Larned*, 21 Wend. 451; *Mason v. Campbell*, 27 Minn. 54; *Graham v. Morrow*, 40 Ga. 487; *Sanders v. Bank*, 13 Ala. 353; and see cases cited *supra*, §§ 953 *et seq.*

³ *Supra*, §§ 852 *et seq.* That a mortgage for a less sum will be an accord and satisfaction, see *Keeler v. Salisbury*, 27 Barb. 485. Whether a security is accepted as security, or as payment, is elsewhere considered. See *supra*, §§ 953 *et seq.*

⁴ *Evans v. Powis*, 1 Ex. 601; *Hall v. Flockton*, 16 Q. B. 1039; and cases cited *supra*, §§ 852 *et seq.*, 996 *et seq.*

security, should not have the same effect when the security consists of a guarantee by a third party. The debtor says, "If you will take two-thirds, I will give you B.'s note." The creditor says, "On consideration of B.'s note, I will take two-thirds." This has all the elements of a binding contract, and substitutes the new agreement for the old.¹ Hence, the reception of a cheque by a third party for a lesser amount, accompanied by a receipt in full, is an accord and satisfaction.² But the new agreement, in such case, "must create a binding contract, supported by a sufficient consideration, and giving a right of action; otherwise it would form no satisfaction of the original debt without an actual performance."³ Hence, an executory contract, by way of compromise, to discharge a disputed claim, by giving the debtor's promissory note for a sum less than the amount actually due, is not a bar to the original demand, although the note has been tendered to the creditor, if it has not been accepted.⁴ To constitute a bar, there must be some additional element of consideration.⁵

§ 1004. It has been already stated that the acceptance of a third party as security on a new contract, before breach, constitutes novation, by which the old agreement is merged in the new.⁶ And in any view, the security of a third party received for a portion of the debt, is a sufficient consideration for the release of the residue.⁷ In such cases, however, the plea must

Acceptance of third party as security amounts to novation.

¹ *Jenness v. Lane*, 26 Me. 475; *Lee v. Oppenheimer*, 32 Me. 253; *Babcock v. Hawkins*, 23 Vt. 561; *Guild v. Butler*, 127 Mass. 386; *Boyd v. Hitchcock*, 20 Johns. 76; *Christie v. Craig*, 20 Penn. St. 430; *Jones v. Perkins*, 29 Miss. 142; *Bradshaw v. Davis*, 12 Tex. 336; *Whitsitt v. Clayton*, Sup. Ct. Colorado, 1881, 12 Rep. 486.

² *Guild v. Butler*, 127 Mass. 386; *supra*, §§ 935, 953.

³ *Leake*, 2d ed. 880; citing *Case v. Barber*, T. Raym. 450; *Lynn v. Bruce*, 2 H. Bl. 317; *Henderson v. Stobart*, 5 Ex. 99; *McManus v. Bark*, L. R. 5 Ex. 65; *Plevins v. Downing*, L. R. 1 C. P.

D. 220. To same effect see *Bragg v. Pierce*, 53 Me. 65; *Costello v. Cady*, 102 Mass. 140; *Clarke v. Hawkins*, 5 R. I. 219.

⁴ *Cushing v. Wyman*, 44 Me. 121; *Miller v. Hatch*, 72 Me. 481; *Clifton v. Litchfield*, 106 Mass. 34; *Blake v. Blake*, 110 Mass. 202; and cases cited *supra*, § 997.

⁵ See *supra*, § 1001; *infra*, § 1032.

⁶ *Supra*, §§ 852 *et seq.*

⁷ *Kemp v. Watt*, 15 M. & W. 672; *Henderson v. Stobart*, 5 Ex. 99; see *Sard v. Rhoads*, 1 M. & W. 153; *Griffiths v. Owen*, 13 M. & W. 63.

aver, and it must be satisfactorily proved, that the substitution was intended as an extinguishment.¹

§ 1005. An agreement by a creditor to take a fractional payment of his debt, in consideration of other creditors making a like reduction, may be supported as an accord and satisfaction on the same principles. There is an adequate consideration to sustain such an agreement, *viz.*, the reciprocal forbearance of creditors, by which a fair division of the insolvent debtor's estate is secured, and he is protected from undue pressure.² Whether the agreement of composition is *per se* a satisfaction, or whether to make it, such payment is a condition precedent, depends upon the construction of the agreement. "At common law, where a body of creditors accept a composition, they may agree to take the promises of the debtor, with or without a surety, in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place, the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement."³ In other words, an agreement may be so couched as to make the assent of a specific number of creditors to the com-

When other creditors release, composition may be satisfactory.

¹ *Ibid.*; *Bayley v. Homan*, 3 Bing. N. C. 920; *Collingbourne v. Mantell*, 5 M. & W. 289; *Harris v. Reynolds*, 7 Q. B. 71; see 1 Smith's L. C. 7th Am. ed. 612; *Babcock v. Hawkins*, 23 Vt. 561.

² *Supra*, § 517; *Boyd v. Hind*, 1 H. & N. 947; *Good v. Cheeseman*, 2 B. & Ad. 328. In *Couldery v. Bartrum*, L. R. 19 Ch. D. 394, *Jessel, M. R.*, said: "It was felt to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. There might be friends of the debtor who would come forward and pay something toward the debts; or it might be that the debtor was in such a position that if the creditors took less than their debts he would have something over for himself, and would exert himself to pay the dividend; whereas,

if the creditors did not, they would get nothing, or less than nothing, if they incurred costs in endeavoring to get payment. Therefore, it was necessary to bind the creditors; and as every debtor had not a stock of canary birds, or tomits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a sensible way, by saying that if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer *nudum pactum*, but an agreement made for valuable considerations, then there would be satisfaction." See for further citation, *supra*, § 1001.

³ *Mellish, L. J., Hatton in re*, L. R. 7 Ch. 726; adopted *Leake*, 2d ed. 881

position, coupled with a promise by the debtor to pay a designated dividend, a satisfaction by itself; or it may be so couched as to make the satisfaction conditioned on payment. In the latter case, if the payment be not made, the original indebtedness may be sued on.¹ And if negotiable paper given under such a composition, the satisfaction being conditioned on payment, be dishonored on maturity, the creditor is entitled to fall back on his original claim.²—Where “a debtor has induced a number of his creditors to accept a composition amounting to less than their entire demand,” “such an agreement, if entered into with the debtor by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each in that case has the undertakings of the rest as a consideration for his own undertaking.”³ The same rule applies to an agreement to give time.⁴ But the agreement ceases to bind a creditor who is afterwards refused the benefit held out to him in the proposed composition.⁵ And when subscriptions are dependent upon all creditors joining, they cannot be enforced if all creditors refuse to join.⁶ The validity of the composition depends on a correlative agreement by other creditors to proportionally abate.⁷

§ 1006. Goods or labor may be taken in satisfaction of a debt, and when this is agreed on by the parties, and the thing agreed on is received, the accord and satisfaction are complete. In such case the question of adequacy is not at issue, supposing that there is no taint of imposition or unfairness.⁸ But services rendered,

Goods or
labor may
be taken in
satisfaction

¹ Leake, 2d ed. 882; Edwards v. Coombe, L. R. 7 C. P. 519; Newell v. Van Praagh, L. R. 9 C. P. 96; Edwards v. Hancher, L. R. 1 C. P. D. 111.

² Edwards v. Hancher, L. R. 1 C. P. D. 111. See as to payment under such circumstances, *supra*, §§ 954 *et seq.*

³ 1 Smith's L. C. 7th Am. ed. 600, citing Reay v. White, 3 Tyrwh. 596, 1 C. & M. 748; Cutter v. Reynolds, 8 B. Mon. 596; and see cases cited *supra*, §§ 379, 527 *et seq.*

⁴ Good v. Cheeseman, 2 B. & Ad. 328.

⁵ Garrard v. Woolner, 8 Bing. 258.

⁶ Reay v. Richardson, 2 C. M. & R. 422.

⁷ Van Rensselear v. Aiken, 44 N. Y. 126.

⁸ *Supra*, § 504; Leake, 2d ed. 878; Metc. on Cont. 191; Curlew v. Clark, 3 Ex. 375; Reed v. Bartlett, 19 Pick. 273; Eaton v. Lincoln, 13 Mass. 424; Blinn v. Chester, 5 Day, 359; Boyd v. Hitchcock, 20 Johns. 76; Kellogg v. Richards, 14 Wend. 116; Dewee v. Cheeko, 35 Ind. 514; Jones v. Bullitt, 2 Littell, 40.

to work a discharge, must be something to be done in consequence of the agreement of satisfaction; not something previously done.¹ And if the services are liquidated by the parties at a sum less than the debt, they are not a satisfaction unless there be some additional consideration.²—The accord in such cases, to be a bar, must be executed in accordance with its terms.³—When a thing incapable of exact liquidation, and susceptible of various estimates as to its value, is given in payment of a debt, the rule that a debt is only discharged by a full money payment does not apply. The thing given, if valued by the parties as an equivalent for the whole debt, must be so considered.⁴—The payee and holder of an overdue note, an aged woman, agreed with the maker, that in consideration of what he had done for her and furnished her, and in consideration of his paying her doctor's bill and funeral expenses, and putting head-stones at her grave and that of her husband, he should have the note, which, however, she was to retain as security. It was held, on a suit by the payee's administrator against the maker, that the agreement, being performed, constituted an accord and satisfaction.⁵

§ 1007. A creditor who elects to take judgment for the fractional part of a debt, may bar himself from the recovery of the remainder.⁶ There is in such cases a merger of the debt in the judgment.⁷

Part payment by way of judgment and execution may satisfy.

§ 1008. We have already noticed the controversy as to whether a payment by a stranger operates to discharge a debt.⁸ The same difference of opinion exists on this point as exists on the cognate question whether a stranger can sue on a contract.⁹ In Eng-

Payment by a stranger may be accord and satisfaction.

¹ *Stead v. Poyer*, 1 C. B. 782; *Goodrich v. Stanley*, 24 Conn. 613.

² *Howard v. Norton*, 65 Barb. 161.

³ *Costello v. Cady*, 102 Mass. 140. See on this topic 1 Smith's L. C. 7th Am. ed. 605.

⁴ *Brooks v. White*, 2 Met. 285; *Watkinson v. Ingleby*, 5 Johns. 386; *Musgrove v. Gibbs*, 1 Dall. 217; and see *Perkins v. Lockwood*, 100 Mass. 249.

⁶ *Ridlon v. Davis*, 51 Vt. 457.

⁵ *Supra*, § 936; *Baker v. Stinchfield*, 57 Me. 363; *Smith v. Jones*, 15 Johns. 229; *Willard v. Sperry*, 16 Johns. 121; *Ingraham v. Hall*, 11 S. & R. 78; and cases cited in Wh. on Ev. § 788.

⁷ See *supra*, §§ 687, 776; Wh. on Ev. § 788.

⁸ *Supra*, § 942.

⁹ See *supra*, §§ 784 *et seq.*

land and in several states in this country, none but the parties to a contract can sue on it, and none but the parties can extinguish it.—On the other hand, we have rulings in this country that a payment by a stranger extinguishes a debt; and we are told that an accord and satisfaction moving from a stranger, or person having no pecuniary interest in the subject matter, if accepted in satisfaction of the debt, constitutes a good defence in an action against the original debtor.¹ But to constitute an extinction of a debt, it is proper that the assent of the debtor should be given.² In New York it was held in an early case, that payment by a stranger is not a satisfaction, and this case is still unreversed.³ But if the debtor assent, then a case of accord and satisfaction is made out.⁴

¹ Day, J., *Harvey v. Tama Co.*, 53 Iowa, 228; citing *Leavitt v. Morrow*, 6 Ohio St. 71.

² See *supra*, § 942.

³ “*Grymes v. Blofield*, Cro. Eliz. 541, that payment of a debt by a stranger is not a satisfaction, has been much criticized and materially limited by subsequent cases in England and elsewhere. *Jones v. Broadhurst*, 9 C. B. 173; *Simpson v. Eggington*, 10

Exch. 845; *Leavitt v. Morrow*, 6 Ohio, 71. But it has been followed in this state, in *Clow v. Borst*, 6 Johns. 37; and has not been authoritatively overruled; and we need not now determine whether it should any longer be regarded as authority.” *Andrews, J., Wellington v. Kelly*, 84 N. Y. 547; and see *Patillo v. Smith*, 61 Ga. 265.

⁴ *Supra*, §§ 852 *et seq.*, 996 *et seq.*

CHAPTER XXXII.

SET-OFF.

Set-off a processual right, and governed by <i>lex fori</i> , § 1009.	Debts must be between the same parties, § 1021.
No set-off at common law, § 1010.	Personal debts cannot be set off against representatives, § 1022.
Set-off may be specially stipulated, § 1011.	Agent's debt cannot be set off against principal, § 1023.
By statute extended to mutual debts, § 1012.	Surety may avail himself of debts due his principal, § 1024.
Equitable claims may be set off, § 1013.	After assignment, debt due assignee may be set off on suit by him, § 1025.
Set-off does not extinguish debt, but only affects remedy, § 1014.	Distinctive rule as to insolvent and bankrupt assignees and receivers, § 1026.
Use of on trial is optional, § 1015.	Principal's debt may be set off against agent, § 1027.
Practice as to counter-claims, § 1016.	So as to partners, § 1028.
Only actionable debts can be set off, § 1017.	Unliquidated damages not admissible as set-off, though admissible as counter-claims, § 1029.
To set-off barred by statute of limitations, statute must be specially pleaded, § 1018.	No set-off admissible in proceedings <i>in rem</i> , § 1030.
Debts not due at date of suit cannot be set off, § 1019.	
Debts must be due when offered at trial, § 1020.	

§ 1009. SET-OFF is a processual right, and is governed by the *lex fori*;¹ and in England, a foreign statute of set-off, going merely to the remedy, will not be regarded as affecting a debt distinctively subject to that law.² It is submitted, however, that when a

Set-off is a processual right, and is governed by *lex fori*.

¹ *Greene v. Darling*, 5 Mason, 201; *Gibbs v. Howard*, 2 N. H. 296; *Carver v. Adams*, 38 Vt. 500; *Ruggles v. Keeler*, 3 Johns. 263; *Second Nat. Bk. v. Hemmingway*, 31 Oh. St. 168; *Davis v. Morton*, 5 Bush, 161.

² *Meyer v. Dresser*, 16 C. B. N. S. 646; see *Macfarlane v. Norris*, 2 B. & S. 783; Wh. Conf. of L. § 788. That set-off when agreed to is equivalent to payment, see *supra*, § 964. That set-off may be appropriated by agreement to debts excluded by statute, see *supra*, § 965.

foreign statute of set-off goes to extinguish a debt subject to it, it should have extra-territorial force.—As a matter of principle, as has already been seen, all equities that go to the substance of a debt are to be determined by the law of the creditor's domicil.¹—As far as concerns conflict as to terms of set-off, the law that rules is the *lex fori* at the time of suit.²

§ 1010. At common law there could be no set-off, unless by special agreement, between parties mutually indebted. Mere mutuality of debts was formerly no ground for set-off, unless there were special circumstances connecting the debts, so that one appeared to have been incurred in consideration of the other.³ An agreement, however, for set-off, it has always been held, may be inferred from the contract between the parties.⁴ Thus where an employer does for himself, with the assent of the contractor, part of a work given out by the contract, the price of this work so done is to be deducted from the contract total price.⁵ It is understood, also, in the negotiations between a principal and an agent, the agent is entitled to set off his commissions against the money collected by him.⁶ Where, also, there is an understanding that an operative should do certain work and find the materials, and it is agreed subsequently that the employer is to find part of the materials, this sustains a set-off by the employer of the materials supplied.⁷—In the old practice, courts of equity took a larger view than courts of law in requiring set-offs to be allowed to all demands in which they relate as forming part of a continuous mutual indebtedness.⁸ But ordinarily a court of equity will not interpose when there is an adequate remedy at law.⁹ Nor will it tolerate assignments made for the mere purpose of enabling a set-off to be interposed.¹⁰

¹ *Supra*, § 843.

⁶ *Dale v. Sollet*, 4 Burr. 2133.

² *Jordan v. Bank*, 74 N. Y. 467.

⁷ *Newton v. Forster*, 12 M. & W.

³ 2 Smith's L. C. 7th ed. 293 *et seq.*; 772.

Leake, 2d ed. § 1001, citing *Rawson v. Samuel*, 1 Cr. & Ph. 161; *Best v. Hill*, L. R. 8 C. P. 10; see *Raymond v. Green*, 12 Neb. 215.

⁸ Story's Eq. Jur. 12th ed. § 1434.

⁹ *Middleton v. Pollock*, L. R. 20 Eq. 33; *Wolcott v. Jones*, 4 Allen, 367.

⁴ See *infra*, § 1011.

¹⁰ *London Bank v. Narraway*, L. R. 15 Eq. 93.

⁵ *Turner v. Diaper*, 2 M. & G. 241.

§ 1011. Agreements for mutual set-offs are common in certain classes of contracts, and this is generally the case with contracts of partnership.¹ In contracts of service, also, it is frequently provided that damage done by breakage or otherwise to the employer's property by the employee shall be set off against the wages.² In building contracts, also, it is frequently stipulated that from the contract price is to be deducted any loss accruing to the employer by the contractor's laches.³ And a reciprocal understanding as to mutual credit will be sustained by a court of equity in the face of intermediate insolvency of one of the parties.⁴

Set-off may be specially stipulated.

§ 1012. In England, the right of set-off in all cases of mutual debts was established by the statute 2 Geo. II. c. 22, s. 13, and was extended by the statute 8 Geo. II. c. 24, s. 4, to cover mutual debts "of a different nature," "unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty, and in all cases where either the debt for which the action shall be brought or the debt intended to be set off against the same shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and, in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."⁵ Statutes authorizing set-offs exist in all jurisdictions in the United States, though usually without the limitation as to penalties, which with us would be applied without specific statutory prescription.⁶—Under the English statute the defendant is entitled to plead a set-off though he

By statute set-off extended to all mutual debts.

¹ *Kinnersley v. Hossack*, 2 Taunt. 170. *Hurlburt v. Ins. Co.*, 2 Sumn. 471. See *supra*, § 1010.

² *Le Noir v. Bristow*, 4 Camp. 134; *Cleworth v. Pickford*, 7 M. & W. 314. ³ *Leake*, 2d ed. 1003.

⁴ *Jones v. St. John's Coll.*, L. R. 6 Q. B. 115. ⁵ As to set-offs in suits by the United States, see *Schaumburg v. U. S.*, 103 U. S. 667.

⁶ *Greene v. Darling*, 5 Mason, 201;

contracted to sell for ready money.¹—In this country the party for whose benefit a suit is brought is made in several states subject to set-off by statute; and the equitable ownership of debts is thus made subject to claims specifically applicable to it.²

§ 1013. Under the older English practice an injunction could be granted to restrain a suit to which there was an equitable set-off.³ At present, under the recent judicature act, the exclusive mode of taking advantage of an equitable set-off as a defence is by plea.⁴ This is the usual practice in this country.⁵ We have an illustration of this rule in a Pennsylvania case,⁶ in which it was held that in an action for the price of cattle, the defendant may give in evidence damage sustained by him by reason of the plaintiff not having delivered to him certain sheep purchased by him in the same transaction of the plaintiff.⁷—It has been held in Alabama that a mortgagor of personal property, after there has been default in payment of the debt for which the mortgage has been given, may, on producing evidence of a debt from the mortgagee to a third party purchased by him (the

¹ Leake, 2d ed. 1005; *Eland v. Karr*, 1 East, 375; *Clarke v. Fell*, 4 B. & Ad. 404; see *Fletcher ex parte*, L. R. 6 C. D. 350.

² *Sheldon v. Kendall*, 7 Cush. 217; *Com. v. Bank*, 11 Metc. 129; *Wolf v. Beales*, 6 S. & R. 244; *Ward v. Martin*, 3 Monr. 18; *Nickerson v. Gilliam*, 29 Mo. 456; see *Devine v. Edwards*, 101 Ill. 138. Payment by A. of the debt of B., without B.'s consent, cannot be allowed as a set-off in a suit by B. against A. *Patillo v. Smith*, 61 Ga. 265. See *supra*, §§ 942, 1008.

³ Leake, 2d ed. 1004; *Kingsford v. Swinford*, 28 L. J. C. 413; *Gumpertz v. Pooley*, 4 Drew. 448.

⁴ *Kemp v. Tucker*, L. R. 8 Ch. 369.

⁵ *Hannay v. Pell*, 3 E. D. Smith, 432; *Black v. Whitall*, 1 Stockt. 572; *Wray v. Furniss*, 27 Ala. 471; *Graves v.*

Hull, 27 Miss. 419. But courts of equity will be governed by the rules as to mutuality, which, as we will presently see, are imposed by courts of law. 2 *Smith*, L. C. 7th Am. ed. 315; *Duncan v. Lyon*, 3 Johns. Ch. 351; *King v. Diehl*, 9 S. & R. 409; *Lehr v. Taylor*, 91 Penn. St. 381; *Gibbs v. Cunningham*, 4 Md. Ch. 322; *Cincinnati Bk. v. Hemingray*, 34 Oh. St. 381; *Lockwood v. Beckwith*, 6 Mich. 168; *Tuscumbia R. R. v. Rhodes*, 8 Ala. 206; *McKinley v. Winston*, 19 Ala. 301; *Cave v. Webb*, 22 Ala. 588; *Simmons v. Williams*, 27 Ala. 507.

⁶ *Shaw v. Badger*, 12 S. & R. 275.

⁷ That in Pennsylvania the doctrines of courts of equity, in respect to set-off, have been adopted in common law practice, see *Troubat & Haly's Prac.* (Brightly's ed.) § 47.

mortgagor), enjoin the foreclosure of the mortgage, the mortgagee being insolvent.¹

§ 1014. That a set-off does not extinguish the debt, but only affects the remedy, is shown by numerous rulings. Thus a tender, as we have seen, is not good if limited to the defendant's indebtedness after deducting the set-off.²—A lien for a specific mortgage debt continues, notwithstanding that the lien creditor is indebted independently to the lien debtor for an amount exceeding the lien.³—Nor can a set-off be used to cancel a forfeiture of a real right.⁴

Set-off does not extinguish debt but only affects remedy.

§ 1015. A defendant having a claim (not consisting of part payment) against the plaintiff, is not bound, according to the English practice, to introduce it as a set-off. He may reserve it for a cross-action, or he may keep it as a defence to a subsequent suit by the same plaintiff, or "he may plead it to an action upon a judgment, although the debt accrued before the commencement of the original action."⁵ The question is whether, by the *lex fori*, the using the set-off is obligatory. Where it consists of a part payment, the weight of authority is that it ought to be offered on trial of the debt claimed to be partially paid:⁶ though it may be otherwise as to set-offs which are purely equitable, or consist of counter-claims.⁷—When a creditor becomes insolvent after obtaining judgment, equity may compel the allowance of any set-off the debtor may have against him, though it existed at the time suit was brought, provided it was not adjudicated against in the suit.⁸

Use of set-off on trial is optional.

¹ *Martin v. Mohr*, 56 Ala. 221. But a claim recoverable only by an action of account, or by a bill in equity, cannot, it is said, be introduced as a set-off. *Russell v. Metler*, 54 Penn. St. 154.

² *Supra*, § 978.

³ *Clark v. Fell*, 4 B. & Ad. 404.

⁴ *Johnson v. Lyttle*, L. R. 5 C. D. 692; see *Leake*, 2d ed. 1004; *infra*, § 1030.

⁵ *Leake*, 2d ed. 1005, citing *Lord*

Campbell, L. C., in *Jenner v. Morris*, 3 D. F. & J. 54.

⁶ Wh. on Ev. § 789, and cases there cited; *supra*, §§ 936-7.

⁷ *Ibid.*; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Davenport v. Hubbard*, 46 Vt. 200; *Bridge v. Gray*, 14 Pick. 55; *McEwen v. Bigelow*, 40 Mich. 215; *supra*, §§ 936-7.

⁸ *Chicago R. R. v. Field*, 86 Ill. 270.

Practise
as to
counter-
claims.

§ 1016. In England, by an order of the supreme court of judicature, a defendant is entitled to set up as "counter-claim" any right or claim against the plaintiff, "whether such set-off or counter-claim sound in damages or not." If there is a balance due the defendant, judgment may be given for such balance. "Counter-claim," under this order, is distinguished from set-off in covering an independent liability from the plaintiff to the defendant, and in permitting judgment to be entered for either party as the merits may require.¹—Costs are proportioned to the balance found, and not to the amount of claim proved.²

§ 1017. Only actionable claims can be introduced either as set-offs or as counter-claims.³ Hence a debt contracted in

¹ Leake, 2d ed. 1006; *Mostyn v. West Mostyn Coal Co.*, L. R. 1 C. P. D. 145; *Harris v. Gamble*, L. R. 6 C. D. 748; *Crowe v. Barnicot*, L. R. 6 C. D. 753.

² *Staples v. Young*, L. R. 2 Ex. D. 324. As to practice, see further, *Newell v. Bank*, L. R. 1 C. P. D. 496; *Norris v. Beesley*, L. R. 2 C. P. D. 80; *Young v. Kitchen*, L. R. 3 C. P. D. 127. As to counter-claim in this country, see *Wacker v. Straub*, 88 Penn. St. 32; *Ritchie v. Hayward*, 71 Mo. 560; *Selleck v. Griswold*, 49 Wis. 39; *Delaney v. McDonald*, 47 Wis. 408; *Read v. Tioga Co.*, 66 Ind. 21; *Mobile, etc., R. v. Clanton*, 59 Ala. 392; see *infra*, § 1299. In *Lebanon Bk. v. Karmany*, Sup. Ct. Penn. 1881, 12 Rep. 540, it was held that to an action against a national bank for the penalty imposed of double the amount of interest obtained on a usurious loan, the defendant could not set off the note. The court said: "The plaintiff's claim is not within the defalcation act, which applies where the parties are 'indebted to each other upon bonds, bills, bargains, promises, accounts, or the like.' It arises from the defendant's violation of a statute remedial and

penal, which gives the borrower the right to recover, for the two-fold purpose of compensation and example. *Overholt v. Bank*, 82 Penn. St. 490; *S. C., Thomp. Nat. Bk. Cas.* 883. It was decided in *Barnet v. Bank*, 8 Otto, 555; *S. C., Browne's Nat. Bk. Cas.* 18, that in an action on a bill of exchange the defendant could not set off a claim for twice the amount of illegal interest he had paid the bank; that his remedy for the wrong was a penal suit, and he could have redress in no other mode or form of proceeding. That set-off is not allowed in such action is well settled. When the prescribed action for recovery is debt, or action in the nature of debt, it gives no right of set-off. After the plaintiff shall have obtained judgment, if the defendant have a judgment against the plaintiff in another case, there is power in the court to order one judgment to be set off against the other, governed by equitable principles. But such principles do not apply in a suit when the claim is in the nature of a penalty for violation of a statute so as to allow defalcation."

³ See *Libby v. Hopkins*, Sup. Ct. U. S. 1882, 25 Alb. L. J. 153; *Messmore v. Larson*, 86 Ill. 268. In *Garrison v.*

infancy, and thus barred, cannot be introduced as a set-off without proof of ratification;¹ nor can a debt barred by the statute of limitations,² nor debts not actionable under the statute of frauds.³—It is no objection to a debt as a set-off that a suit has been brought on it which is still pending;⁴ nor that a judgment has been entered on such claim in the defendant's favor, provided he is the beneficial owner.⁵ But the judgment must be virtually between the same parties.⁶—Hence a claim to be thus set off must be owned absolutely by the defendant. It cannot be borrowed by him for the occasion.⁷

Only actionable debts can be set off.

§ 1018. When a debt barred by the statute of limitations is put in evidence by the defence, the plaintiff, according to the English practice, must specially plead the statute in reply, if the object is to dispute the debt on that ground.⁸ The set-off is good, so far as the statute is concerned, if the debt was not barred at the time of the commencement of the suit.⁹ The statute is met in such cases in the same way that it is met when it is set up by plea. The defendant may show that the plaintiff acknowledged the debt which is the subject of the set-off.¹⁰—The date of items in a set-off is not conclusive, but may be explained by parol.¹¹

To set-off barred by statute of limitations, statute must be specially pleaded.

Paul, 1 Penn. Sup. Ct. 380, it was said: "It is certainly well settled law that a defendant's right to a set-off must be perfect at the time the suit is instituted. We know of no doctrine of equitable set-off which dispenses with this rule. A surety has an action against his principal before being actually compelled to pay the money, because he could file a bill in equity for indemnity. But there can be no action for contribution between co-sureties, either at law or in equity, until the surety is obliged to pay the debt." *Per curiam*.

¹ Rawley v. Rawley, L. R. 1 Q. B. D. 460.

² *Infra*, § 1018.

³ Sennett v. Johnson, 9 Beav. 335.

⁴ Peabody v. Southgate, 5 Pick. 1;

Braynard v. Fisher, 6 Pick. 355; Collins v. Allen, 12 Wend. 356; though see Lock v. Miller, 3 St. & P. 13.

⁵ Satterlee v. Ten Eyck, 7 Cow. 480; Turner v. Satterlee, 7 Cow. 481; Metzgar v. Metzgar, 1 Rawle, 227; Bell v. Cowgill, 1 Ashm. 8.

⁶ Ramsey's App., 2 Watts, 228.

⁷ Gilman v. Van Slyck, 7 Cow. 469; *infra*, § 1021.

⁸ Leake, 2d ed. 1007; Chapple v. Durston, 1 C. & J. 1; see Reed v. Marshall, 90 Penn. St. 345.

⁹ Walker v. Clements, 15 Q. B. 1046; Taylor v. Gould, 57 Penn. St. 152.

¹⁰ Rawley v. Rawley, L. R. 1 Q. B. D. 460.

¹¹ McEwing v. James, 36 Oh. St. 152; Wh. on Ev. § 977.

§ 1019. A debt from the plaintiff to the defendant, not due until after the beginning of the suit, cannot be received in evidence by way of set-off.¹ Such a debt cannot be introduced under a plea *pais darrein continuance*,² even in cases where the liability was incurred prior to suit, if it has not accrued prior to suit.³ Nor can it be used as a basis for an injunction.⁴ The fact, however, that the set-off did not become due until after the debt to which it is offered as a set-off, does not in any way affect its admissibility.⁵

§ 1020. The set-off must not only have been due at the time of the commencement of the suit, but must continue due at the time it is offered in evidence. If it has been paid,⁶ or if it has been assigned to another party,⁷ it cannot be received in evidence. It has *a fortiori* been held that a set-off must be in force as such when pleaded.⁸—The same rule exists with regard to counter-claims.—In a case before the supreme court of Pennsylvania, in 1881, the defendants to an action brought for the price of coke, on November 29, 1879, pleaded as a set-off or counter-claim damages from the breach of a contract for the sale of coke, such contract being in writing, dated November 11, and beginning to run December 1, 1879. It was proved that the plaintiffs, on November 19, six days after the making of the contract, notified the defendants that they would not make any deliveries under it. On December 4, 1879, they wrote the plaintiffs they were ready to receive the coke and make payment therefor; that if shipments were not made they

¹ Leake, 2d ed. 1008; *Hutchinson v. Read*, 3 Camp. 329; *Evans v. Prosser*, 3 T. R. 186; *Gladstane's case*, L. R. 1 Ch. 538; *Houghton v. Houghton*, 37 Me. 72; *Carpenter v. Butterfield*, 3 Johns. Ca. 145; *Morrison v. Moreland*, 15 S. & R. 61; *Huling v. Hugg*, 1 W. & S. 418; *Smith v. Ewer*, 22 Penn. St. 116; *Stewart v. Ins. Co.*, 9 Watts, 126; *Mizzell v. Moore*, 7 Ired. 225; *Haughton v. Leary*, 3 Dev. & B. 21; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Carpew*

v. Canavan, 4 How. Mass. 370; *Brazelton v. Brooke*, 2 Head, 194.

² *Richards v. James*, 2 Ex. 471.

³ *Sennett v. Johnson*, 9 Barr, 335.

⁴ Leake, 2d ed. 1008, citing *Maw v. Ulyatt*, 31 L. J. C. 33.

⁵ *Lee v. Lester*, 7 C. B. 1008.

⁶ *Eyton v. Littledale*, 4 Ex. 159.

⁷ *New Quebrada Co. v. Carr*, L. R. 4 C. P. 651.

⁸ *Lowell v. Lane*, 33 Barb. 292.

would buy in the open market, and hold the plaintiffs responsible for any difference in price they would have to pay, etc., etc. It was held that even if the plaintiffs did not fulfil the contract for the sale of coke, there was, at the time of the commencement of the action, no breach, and defendants had no right of set-off on that account. "Nor does it help the defendants that when the cause was tried the breach was complete. The date of the commencement of the suit is the obvious test in such cases."¹

§ 1021. It is essential, to enable a set-off to be put in evidence, that it should be a debt from the plaintiff to the defendant. The test is mutuality.² Set-off, in regard to parties, may be considered as follows:—

Debts must be between the same parties.

1. When the defendant sued by a single plaintiff sets off a debt claimed to be due him jointly by the plaintiff and a third party. In this case the set-off cannot be permitted, as the defendant could not have maintained a suit against the plaintiff on the debt.³ Hence, in a suit by A., a set-off against A. and B. as partners cannot be received.⁴ Nor can B., when sued by A. for a separate debt, set off, under the English statute, a debt due from A. to B. and C. jointly;⁵ though if sued solely by A. for a joint debt of himself and another, he may plead a set-off of a debt due to them jointly by A.⁶ It is

¹ Paxson, J., *Zuck v. Rafferty*, Sup. Ct. Penn. 1881, citing *Morrison v. Moreland*, 15 S. & R. 61; *Carpenter v. Butterfield*, 3 Johns. Cas. 144.

² *Isberg v. Bowden*, 8 Exch. 852; *Schofield v. Corbitt*, 11 Q. B. 779; *Parker v. Kendall*, 3 Vt. 540; *Stickney v. Clement*, 7 Gray, 170; *Backus v. Spalding*, 129 Mass. 234; *North Bridge-water Bank v. Soule*, 129 Mass. 528; *Francis v. Rand*, 7 Conn. 221; *Dale v. Cooke*, 4 Johns. Ch. 11; *Murry v. Toland*, 3 Johns. Ch. 599; *Falkland v. Bank*, 84 N. Y. 145; *Ramsey's App.*, 2 Watts, 228; *McDowell v. Tyson*, 14 S. & R. 300; *Carman v. Garrison*, 13 Penn. St. 158; *Haage's App.*, 17 Penn. St. 181; *Singerly v. Swain*, 33 Penn. St. 102; *McCracken v. Elder*, 34 Penn. St.

239; *Logan v. King*, 38 Penn. St. 93; *Scott v. Fritz*, 51 Penn. St. 418; *Balt. Ins. Co. v. McFadon*, 4 H. & J. 31; *Watkins v. Lane*, 4 Md. Ch. 13; *Hen-nighausen v. Tischer*, 50 Md. 583; *Fus-ting v. Sullivan*, 51 Md. 489; *Tyrrell v. Tyrrell*, 54 Md. 167; *Ryan v. Barger*, 16 Ill. 28; *Enix v. Hays*, 48 Iowa, 86; *Jones v. Blair*, 57 Ala. 457. See *Bow-year v. Pawson*, L. R. 6 Q. B. D. 540, and note thereto, 29 Eng. R. 704.

³ *Arnold v. Bainbridge*, 9 Ex. 153; *Jackson v. Robinson*, 3 Mason, 138; *Blankenship v. Rogers*, 10 Ind. 333; *Ryan v. Barger*, 16 Ill. 28.

⁴ *McDowell v. Tyson*, 14 S. & R. 300.

⁵ *Leake*, 2d ed. 1011, citing *Middle-ton v. Pollock*, 44 L. J. C. 618.

⁶ *Stackwood v. Duna*, 3 Q. B. 822.

otherwise as to a debt owing by the plaintiff to a co-obligor, not summoned, which cannot be set up against a joint demand.¹ A surviving partner, also, in a suit against himself on a debt individually incurred by him, can set off a debt due by the plaintiff to the firm of which he was a member.² On the death, also, of one of two or more joint debtors or creditors, the debt accrues to the survivor, and may then be pleaded as a set-off to an originally several debt of the survivor.³ A defendant, also, sued singly by a single plaintiff, may set off a joint and several debt due him by such plaintiff with others.⁴ And to a suit by a surviving partner for a firm debt the defendant may set off a debt due to him by the plaintiff in his individual capacity;⁵ unless, in case of the insolvency of the plaintiff, it should appear that this would work injustice to the firm.⁶—Where there is one plaintiff and one defendant, the defendant may introduce, as an equitable defence, a debt due from the plaintiff to the defendant and his partners as a firm. This is not technically a set-off, unless the debt should have been assigned to the defendant; but the right to use such a debt for such a purpose is to be inferred from the assent of the other partners, when such assent is proved.⁷

¹ *Henderson v. Lewis*, 9 S. & R. 379; *Archer v. Dunn*, 2 W. & S. 327.

² *Johnson v. Kaiser*, 40 N. J. L. 286.

³ *French v. Antrade*, 6 T. R. 582, cited *Leake*, 2d ed. 1012.

⁴ *Owen v. Wilkinson*, 5 C. B. N. S. 526.

⁵ *Lewis v. Culbertson*, 11 S. & R. 48.

⁶ *Waln v. Hewes*, 5 S. & R. 468.

⁷ *Wrenshall v. Cook*, 7 Watts, 464; *Craig v. Henderson*, 2 Barr, 261; *Solli-day v. Bissey*, 12 Penn. St. 347.

In *Hopkins v. Lane*, N. Y. Ct. App. 1882, 25 Alb. L. J. 175, the plaintiff sold to L., B., and M. jointly, a quantity of cheese. Each of the purchasers gave plaintiff a note for his share of the purchase-money. In an action against L. upon his note, he set up a counter-claim of breach of warranty and fraud in the sale of the cheese.

It was held, that the counter-claim was not available to L. The sale, such is the reason given, was joint and the liability of the purchasers was joint, but after the giving of the notes there was no joint obligation, simply because the cheese had been paid for. "But payment in the mode adopted did not affect the contract of purchase or the relation between the parties growing out of the joint purchase. Any claim, therefore, for damages growing out of the breach of warranty or the fraud, belonged to the three purchasers jointly, and could not be used by one of them as a counter-claim. One of them could not have separately sued the plaintiff to recover such damages, hence one of them cannot separately set up such damages as a counter-claim, under Code Civ. Pro. § 151."

2. Where there are several joint plaintiffs and one defendant; in which case a debt due by one of the plaintiffs cannot be set off.¹ To permit such a set-off would work injustice, "because that would be varying the remedy of the others without their consent, and compel them to exchange one debtor for another who might not be equally good or solvent."²—Under the English judicature act, a defendant to a suit by several plaintiffs on a joint claim may set off separate counter-claims connected with the same matter, against each plaintiff.³

3. Where there are two or more defendants jointly sued by one plaintiff; in which case one of the defendants, if there be no conflicting equities, may set off a debt due him by the plaintiff, the other defendants being assumed to assent.⁴—Courts of equity, in respect to the general principle before us, follow courts of law in refusing to allow a set-off of a separate against a joint debt, unless such assent is to be inferred.⁵ But where one joint debtor is only a surety for the other, he may set off a debt to the creditor by the co-defendant, who is virtually the principal.⁶ And a joint debtor or creditor may by his conduct estop himself from maintaining that a debt offered to be set off was joint and not several.⁷

¹ Woods v. Carlisle, 6 N. H. 27; sley v. Hoffman, 13 Penn. St. 603; Palmer v. Green, 6 Conn. 14; Pickney v. Kyler, 4 E. D. Smith, 469; Milburn v. Guyther, 8 Gill, 92; Tyrrell v. Tyrrell, 54 Md.; Booe v. Watson, 13 Ind. 387; Harlan v. Prosser, 28 Ga. 219; Davis v. Notware, 13 Nev. 421; Thatcher v. Notwell, 4 Col. 375. As to partnership, see *infra*, § 1028.

² 2 Smith, L. C. 7th Am. ed. 320, citing Archer v. Dunn, 2 W. & S. 327; Johnson v. Kent, 9 Ind. 252; see Choen v. Guthrie, 15 W. Va. 100; Elder's App., 39 Mich. 474.

³ Leake, 2d ed. 1012; Manchester, etc. R. R. v. Brooks, L. R. 2 Ex. D. 243.

⁴ Childerston v. Hammon, 9 S. & R. 68; Stewart v. Coulter, 12 S. & R. 252; Crist v. Brindle, 2 Rawle, 121; Bal-

Miller v. Kreiter, 76 Penn. St. 78; Locke v. Locke, 57 Ala. 473; Leach v. Lambeth, 14 Ark. 668; see Montz v. Morris, 89 Penn. St. 392; 2 Smith's Lead. Cas. 7th Am. ed. 320; Troubat & Haly's Prac. (Brightly's ed.) § 551.

⁵ Story, Eq. Jur. 12th ed. § 1437; Leake, 2d ed. 1011.

⁶ *Infra*, § 1024; Hanson *ex parte*, 12 Ves. 346; 18 Ves. 232; Cheetham v. Crook, 1 McC. & Y. 307; Dale v. Cooke, 4 Johns. Ch. 15.

⁷ Stephens *ex parte*, 11 Ves. 24; Vulliamy v. Noble, 3 Mer. 621. To a suit on a note by a bank as endorsee the defendant may set off stock held by him in the bank. Whittington v. Bank, 5 H. & J. 489. A debt for goods sold to a husband will not be a set-off to a

§ 1022. When an executor sues in his representative capacity, a debt due by him personally cannot be set off by the defendant, nor when he sues as an individual can a debt due by him as executor be set off;¹ nor, under the English statute, when an executor sues for a debt accruing to him as such after his testator's decease, can a debt due to the defendant from the testator in his lifetime be set off;² nor to an action by the executor for a debt due the testator at his death can there be set off a promissory note of the testator that accrued after his death.³ The debt of an ancestor, also, cannot be set off to meet a suit by the heir, although the heir came into possession by descent of assets which might have been made chargeable with the debt.⁴ But to a suit for a debt due the deceased during his lifetime, all debts due by him in his lifetime may be set off; and the converse also holds good.⁵ In this country a still more liberal practice has grown up, mutual debts being set off against each other after the death of one of the parties without regard to the period of maturity;⁶ though, in cases of insolvency, set-offs of this class will not be permitted where the effect is to disturb equality of distribution.⁷ In equity it is held that to a suit by a distributee an administrator may set off a debt due by the distributee to the administrator in his own right.⁸ And an executor may retain a legacy by

Personal debts cannot be set off against representatives.

suit brought by him jointly with his wife on a note given to her when sole. *Smith v. Johnson*, 5 Harring. 40.

¹ Leake, 2d ed. 1013; *Bishop v. Church*, 3 Atk. 691; *Isberg v. Bowden*, 8 Exch. 854; *Grew v. Burditt*, 9 Pick. 265; *Wolfsberger v. Bucher*, 10 S. & R. 16; *Dale v. Cooke*, 4 Johns. Ch. 11; *Fry v. Evans*, 8 Wend. 530; *Hills v. Tallman*, 21 Wend. 674; *Armstrong v. Pratt*, 2 Wis. 299; *Harbin v. Levi*, 6 Ala. 399; *Jones v. Brevard*, 59 Ala. 499; *Bales v. Hyman*, 57 Miss. 330; see *Bailey v. Finch*, L. R. 7 Q. B. 34.

² Leake, 2d ed. 1013; 2 Wms. on Ex.

1596; *Schofield v. Corbett*, 11 Q. B. 779; *Rees v. Watts*, 11 Ex. 410.

³ *Newell v. Bank*, L. R. 1 C. P. D. 496; see *Mardall v. Thelusson*, 6 E. & B. 976.

⁴ *Scott v. Scott*, 17 Md. 78.

⁵ *Blakesley v. Smallwood*, 8 Q. B. 538.

⁶ *Mercein v. Smith*, 2 Hill, 210; *Dorshheimer v. Bucher*, 7 S. & R. 9.

⁷ *Bosler v. Bank*, 4 Barr, 32; *Granger v. Granger*, 6 Ohio, 35; *Poorman v. Goswiler*, 2 Watts, 69.

⁸ *Taylor v. Taylor*, L. R. 20 Eq. 155; cited Leake, 2d ed. 1014; see *Farrow v. Farrow*, 12 S. C. 168.

way of set-off against a debt due from the legatee to the testator.¹

§ 1023. When an agent deals as such, and a suit is brought by the principal on a debt incurred to the agent as agent, a debt due by the agent to the defendant cannot be set off.² But when the principal is not known in the transaction, and when the agent is permitted by the principal to appear as the sole party in interest, then the defendant may offer as a set-off debts due to himself by the agent.³ The question is one of notice. If it was the duty of the defendant to have advised himself of the fact of agency, then he cannot set up the agent's debts to him against the principal.⁴

Agents' debt cannot be set off against principal.

§ 1024. When a surety is sued on his obligation as surety, he is entitled to set off any debt due from the creditor to the principal, by which the debt of the principal to the creditor could be diminished.⁵ A surety may also set off a debt due himself by the creditor in reduction of the principal indebtedness.⁶

Surety may avail himself of debts due his principal.

§ 1025. After a debt is assigned, the assignee is regarded as the real creditor, and the defendant, in a suit brought on it, may set off a debt to him from the assignee,⁷ though the assignee takes the debt burdened with any equities which may have attached to it

After assignment debt due assignee may be set

¹ Campbell v. Graham, 1 Russ. & M. 453; McMahon v. Burchell, 5 Hare, 325.

² Wh. on Agency, §§ 447, 467, 755; Reutschler v. Huckle, 3 Ill. Ap. 144; as to partnership, see *infra*, § 1028.

³ Leake, 2d ed. 1014; George v. Claggett, 7 T. R. 359; Semenza v. Brinsley, 18 C. B. N. S. 467; Dixon *ex parte*, L. R. 4 C. D. 133; Oulds v. Harrison, 10 Exch. 572; Parker v. Donaldson, 2 W. & S. 9; Gardner v. Allen, 6 Ala. 187.

⁴ Borries v. Bank, L. R. 9 C. B. 38; Dresser v. Norwood, 17 C. B. N. S. 466.

⁵ Leake, 2d ed. 1017; 2 Smith's L. C. 7th Am. ed. 320; Murphy v. Glass, L. R. 2 P. C. 408; Bechervaise v. Lewis,

L. R. 7 C. P. 372; Green v. Darling, 5 Mason, 201; Newell v. Salmons, 22 Barb. 647; Crist v. Brindle, 2 Rawle, 121; Knour v. Dick, 14 Ind. 20; see Hanson *ex parte*, 12 Ves. 346; S. C., 18 Ves. 252; Dale v. Cooke, 4 Johns. Ch. 15.

⁶ Ibid., Stephens *ex parte*, 11 Ves. 24; see Dart v. Sherwood, 7 Wis. 523.

⁷ Clark v. Cort, Cr. & Ph. 154; McGrath v. Gray, L. R. 9 C. P. 216; Sheldon v. Kendall, 7 Cush. 217; Com. v. Bank, 11 Metc. 129; Spencer v. Babcock, 22 Barb. 326; Beckwith v. Bank, 5 Selden, 211; Ward v. Martin, 3 Monroe, 18; and cases cited *supra*, § 842.

off in suit before notice to the defendant of the assignment.¹ by him. No debt, however, incurred by the assignor to the defendant after he has had notice of the assignment can be set off by him against the assignee.²—To a suit by the *bona fide* endorsee for value of a note, a demand in favor of the maker against the endorser is not admissible as a set-off, although the note when the endorsee took it was overdue.³

§ 1026. An assignee in bankruptcy or insolvency, not being a purchaser, takes subject to any equity available against the assignor.⁴ In Massachusetts, unliquidated claims,⁵ “demands not yet due,”⁶ and demands growing out of partial failure of consideration,⁷ may be set off in an action brought by the assignees of an insolvent during his life, or by his executors after his decease.”⁸ No claim, however, acquired after the bankrupt or insolvent assignment, and no claim got up in contemplation of such assignment, can be set off against the assignee.⁹ A claim, therefore, bought by a debtor, after notice that a petition in insolvency is about to be filed, cannot be used by him as a set-off.¹⁰ Nor can a debt due from an assignor be set off against a suit brought by the bankrupt assignee to recover the price of the bankrupt’s effects sold by the assignee to the defendant; as otherwise one purchaser might pay himself in

Distinctive rule as to assignee in insolvency and bankruptcy; and to receivers.

¹ *Cavendish v. Graves*, 24 Beav. 163; *Am. ed.* 129; *Tuckers v. Oxley*, 5 *Aldrich v. Campbell*, 4 *Gray*, 284; *Cranch*, 34; *Holbrook v. Receiver*, 6 *Hunt v. Shackleford*, 55 *Miss.* 94; see fully *supra*, § 842 for cases. *Paige*, 220; *Maas v. Goodman*, 2 *Hilt.* 275; *Stow v. Yarwood*, 20 *Ill.* 497.

² See *supra*, §§ 836, 842 *et seq.*; *Watson v. R. R.*, *L. R.* 2 *C. P.* 593. That a court of equity will intervene where there is no due remedy in this respect at law, see *Blake v. Langdon*, 19 *Vt.* 485. As we have already seen, a debt, to the assignor, to be a set-off, must be due at the time of the assignment, *supra*, § 844.

³ *Bemis v. Smith*, 10 *Met.* 194.
⁴ *Demmon v. Bank*, 5 *Cush.* 194; *Bigelow v. Folger*, 2 *Metc.* 255.

⁵ *Knapp v. Lee*, 3 *Pick.* 452; *Jarvis v. Rogers*, 15 *Mass.* 407.

⁶ 2 *Smith's L. C.* 7th *Am. ed.* 308.

⁷ *Irons v. Irons*, 5 *R. I.* 264; *Clarke v. Hawkins*, 5 *R. I.* 219; *Northampton Bk. v. Balliett*, 8 *W. & S.* 317.

⁸ *Smith v. Hill*, 8 *Gray*, 572; *Ogden v. Cowley*, 2 *Johns.* 274; *Richter v. Selin*, 8 *S. & R.* 425.

⁹ *Chandler v. Drew*, 6 *N. H.* 469; *Stedman v. Gillson*, 10 *Conn.* 55; *Robinson v. Lyman*, 10 *Conn.* 30; see *Chambliss v. Matthews*, 57 *Miss.* 306.

¹⁰ *Smith v. Hodson*, 2 *Smith L. C.* 7th

full out of the bankrupt's assets, to the spoliation of others.¹ The same distinctions apply to receivers of insolvent firms or corporations, although authorized to sue in their own names.²

§ 1027. To a suit by A. against B., B. is not permitted to answer that behind A. is C., who is B.'s debtor, unless it should be alleged that the suit is really for the benefit of C.³ If, however, the suit is for C.'s benefit, and if A. sues merely as trustee for C., then a debt due by C. to B. may be set off by B.⁴

Principal's
debt may
be set off
against
agent.

§ 1028. Set-offs with regard to partners are governed by the same principles as set-offs with regard to agents. If a firm permits a particular partner to deal as if he were the sole person interested, it must take the consequences, and when he sues for a debt due, as it may be alleged, to the firm, a personal debt due by him to the defendant may be set off.⁵ On the other hand, he cannot, by bringing the suit in his own name, cut off the defendant from using a set-off against the firm, if the firm is the party beneficially inter-

So as to
partners.

¹ 2 Smith's L. C. 7th Am. ed. 314, citing *Shipman v. Thompson*, Willes, 103; *Shaw v. Gookin*, 7 N. H. 16; *Fry v. Evans*, 8 Wend. 530; *Mercein v. Smith*, 2 Hill, N. Y. 210; *Laurence v. Neilson*, 21 N. Y. 158; *Wolfsberger v. Bucher*, 10 S. & R. 10; *Hillier v. Ins. Co.*, 3 Barr, 470; *Steel v. Steel*, 12 Penn. St. 64; *McDonald v. Black*, 20 Ohio, 185; *Mellen v. Boorman*, 13 Sm. & M. 106.

² 2 Smith's L. C. *ut supra*, citing *Clarke v. Hawkins*, 5 R. I. 219; *Miller v. Receiver*, 1 Paige, 444; *Holbrook v. Receivers*, 6 Paige, 220; *Robinson v. Howes*, 20 N. Y. 84; *Laurence v. Neilson*, 21 N. Y. 158; *Berry v. Bretts*, 6 Bosw. 627; *Receivers v. Gaslight Co.*, 3 Zab. 283; *Naglee v. Palmer*, 7 Cal. 543.

In *Morgan v. Bank*, 8 S. & R. 73, it was held that the assignees of an insolvent stockholder cannot compel the transfer of his stock without paying the full amount due by him to

the bank. And in *The Receiver v. Gaslight Co.*, 3 Zab. 283, it was held that the right to set off a debt due by a bankrupt to meet a suit by his assignees will be sustained on equitable grounds, notwithstanding apparent want of mutuality. The defendant was consequently held entitled to set off the amount due to him as a depositor and noteholder of the bank, at the time it became insolvent, against the receivers appointed to wind up its affairs, without a previous demand of payment, although such a demand might have been requisite under ordinary circumstances. See statement of case in 2 Smith's L. C. 7th Am. ed. 313.

³ Wh. on Agency, §§ 406, 465, 741, 830; *Turner v. Thomas*, L. R. 6 C. P. 610.

⁴ *Ibid.*; *Isberg v. Bowden*, 8 Ex. 852.

⁵ *Leake*, 2d ed. 1014; *Gordon v. Ellis*, 2 C. B. 821. As to joint plaintiffs and joint defendants, see *supra*, § 1021. As to release see *infra*, § 1038.

ested.¹ Nor to an action by the firm can a debt by one of the partners be set off;² nor to a suit by a partner, a debt due by the firm.³ Under the judicature act, however, separate debts may be admitted as counter-claims.⁴

§ 1029. Under the set-off statutes, claims for unliquidated damages are inadmissible, though such claims may be received under the English judicature act as counter-claims, and may in like manner be put in evidence under the statutes of some of our states. Under the old practice, and by the statutes of other states, wherever the claim cannot be ascertained exactly at the time of pleading, it is inadmissible as a set-off.⁵ Thus a loss on a policy of insurance could not under the old statutes be proved as a set-off;⁶ nor to an action for freight could there be set off damages accruing to the defendant, from the plaintiff's delay in getting the ship ready, except so far as such damages are assessed by the charter-party,⁷ nor a claim for damage to the goods carried;⁸ nor a cause of action exclusively in tort to a cause of action exclusively in contract.⁹ It is otherwise with regard to set-offs for damages assessed and liquidated by the contract,¹⁰ as where by the contract a particular sum is to be paid in lieu of notice for the dismissal of a servant.¹¹ Under statutes providing for the admission of counter-claims, claims for unliquidated damages may be ad-

¹ See Wh. on Ag. §§ 465, 723, 741, 762; *supra*, § 1022.

² *France v. White*, 6 Bing. N. C. 33; *Piercy v. Fynney*, L. R. 12 Eq. 69.

³ *Mitchell v. Sellman*, 5 Md. 376.

⁴ *Manchester R. R. v. Brooks*, L. R. 2 Ex. D. 243.

⁵ *Leake*, 2d ed. 1008 *et seq.*; *Williams v. Flight*, 2 Dow, N. S. 11; *Hutchinson v. Sidney*, 10 Ex. 438; *Brown v. Tibbits*, 11 C. B. N. S. 858; *Crampton v. Walker*, 3 E. & E. 321; *Union Ins. Co. v. Howes*, 124 Mass. 470; *Barry v. Cavanagh*, 127 Mass. 394; S. C., 130 Mass. 436; *Ford v. Burchard*, 130 Mass. 424; *Clyde v. Knight*, 12 R. I. 194; *Parker v. Hartt*, 32 N. J. Eq. 225, 844;

Woods v. Ayres, 39 Mich. 210; *Howell v. Medler*, 41 Mich. 641.

⁶ *Grant v. Exchange Co.*, 5 M. & S. 430; *Thompson v. Redman*, 11 M. & W. 487; *Beckwith v. Bullen*, 8 E. & B. 683.

⁷ *Seeger v. Duthie*, 8 C. B. (N. S.) 45.

⁸ *Meyer v. Dresser*, 16 C. B. (N. S.) 646.

⁹ *Zeigelmuller v. Seaman*, 63 Ind. 489; *Smith v. Printup*, 59 Ga. 610.

¹⁰ See *Leake*, 2d ed. 1010; *Duckworth v. Alison*, 1 M. & W. 412; *Legge v. Harlock*, 12 Q. B. 1015.

¹¹ *East Anglian R. R. v. Lythgoe*, 10 C. B. 726.

mitted in defence.¹—Under the Pennsylvania statute, unliquidated damages arising *ex contractu* may be set off, whenever capable of liquidation, on trial, and when such damages were due at the inception of the suit, though the contract was distinct from that on which suit was brought. If the counter-claim be in excess of the plaintiff's claim, the defendant may have a certificate of a balance in his favor.² Hence, it has been held that in an action on a note the defendant may set off usurious interest paid in another transaction.³ Damages sounding in tort, however, cannot, in Pennsylvania, be defalked, unless in cases in which the defendant could have waived the tort and sued in *assumpsit*.⁴

§ 1030. From the nature of the case there can be no set-off in a proceeding *in rem*;⁵ and a foreclosure suit is a proceeding *in rem*.⁶ Tax procedure falls within the same category.⁷ Hence a debt due to a municipal corporation for taxes cannot be offset by a debt due by the corporation.⁸ But to a *scire facias* on a mechanic's lien the contractor may set off a debt against the plaintiff.⁹

No set-off
in proceed-
ings *in rem*.

¹ *Supra*, § 1016; Leake, *ut supra*; Norris v. Sharp, 65 Ind. 47; Devries v. Warren, 82 N. C. 356; Bryce v. Parker, 11 S. C. 337; Mobile R. R. v. Clanton, 59 Ala. 392.

² Troubat & Haly's Pract. (Brightly's ed.) § 550, citing Carman v. Ins. Co., 6 W. & S. 155; Ellmaker v. Ins. Co., 6 W. & S. 439; Shoup v. Shoup, 15 Penn. St. 361; Speers v. Sterrett, 29 Penn. St. 192; Hunt v. Gilmore, 59 Penn. St. 450; Halfpenny v. Bell, 82 Penn. St. 128; Biswanger v. Stocker, 2 Weekly Notes, 407; Domestic S. M. Co. v. Saylor, 86 Penn. St. 287.

³ Thomas v. Shoemaker, 6 W. & S. 179; Brown v. Bank, 72 Penn. St. 209; Lucas v. Bank, 78 Penn. St. 228.

⁴ Kachlin v. Mulhollon, 2 Dall. 237; S. C., 1 Yeates, 571; Cornell v. Green, 10 S. & R. 14; Wright v. Smyth, 4 W. & S. 527; Charlton v. Alleghany City, 1 Grant, 208; Thomson's Est., 5 Weekly Notes, 14.

⁵ See Johnson v. Lyttle, L. R. 5 C. D. 692, cited *supra*, § 1014.

⁶ Parker v. Hartt, 32 N. J. Eq. 223, 844.

⁷ Hoffmire v. Rice, 22 Kan. 749; Nebraska City v. Nebraska Gas Co., 9 Neb. 339.

⁸ New Orleans v. Davidson, 30 La. An. part i. 541.

⁹ Gable v. Parry, 13 Penn. St. 181.

CHAPTER XXXIII.

RELEASE.

A release is a discharge of a claim, § 1031.	Release to be construed according to intention, § 1037.
At common law must be under seal, or must have consideration, § 1032.	Must be by proper parties, § 1038.
No special words required to constitute, § 1033.	May be conditional, § 1039.
Release discharges debt and incidents, § 1034.	May be by novation and merger, § 1040.
Will be equitably restrained, § 1035.	May be by alteration of document, § 1041.
Effect of covenant not to sue, § 1036.	Rescission implied by lapse of time, § 1042.

§ 1031. A RELEASE is a discharge of a claim. It is distinguishable, therefore, from novation, which implies the substitution of a new for an old claim, while release implies the extinction of the relation of debtor and creditor in the particular instance;¹ and it is distinguishable, also, from payment, which implies the satisfaction of the debtor, whereas a release under seal may be, as we will presently see, without consideration. A release, also, differs from rectification in this, that while a release discharges a contract, rectification restores the contract in the sense in which it was actually intended by the parties.² And a release operates not only as a discharge, but as an estoppel, precluding the party releasing from advancing the claim released against any party doing anything *bona fide* on the faith of the release.³

¹ That a release may be preliminary to novation, see *infra*, § 1040.

² *Supra*, §§ 282 *et seq.* 919.

³ *Rowntree v. Jacob*, 2 Taunt. 141 ;

Baker v. Dewey, 1 B. & C. 704 ; *Harding v. Ambler*, 3 M. & W. 279 ; *Yeomans v. Williams*, L. R. 1 Eq. 184.

§ 1032. A release, unless under seal, is at common law inoperative in abrogating or discharging a contract under seal.¹ By statute in England, however, payment of a sealed obligation may be pleaded in bar without producing a release, and by the common law procedure act the defendant is entitled to pay into court a sum which will answer the claim of the plaintiff in respect of such bond.² The same practice exists in this country in most jurisdictions.—In Pennsylvania a seal has never been held necessary to the release of sealed obligations,³ and this is now the general practice, both as to sealed and unsealed contracts, when there is any consideration for the release.⁴ *Before* breach, it is true, a novation operates as a release.⁵ But *after* breach, whether the contract be under seal or not, a release not under seal must, to be operative, be on a sufficient consideration.⁶—A judgment may in England be barred, so far as its efficiency for execution is concerned, by a release under seal; though to extinguish it as a lien, there should be a rule taken, in our practice, to enter satisfaction.⁷—An exception to the rule that an action cannot be discharged except by a release under seal, or a release with sufficient consideration, is to be found in the case of negotiable paper, which is regulated by rules founded on the custom of merchants; so that liability on such paper “may be discharged by the holder by express dispensation or waiver without deed and without con-

At common law must be under seal or must have consideration.

¹ *Supra*, §§ 996–7; *Nichol's case*, 5 Co. Rep. 43 a.

² *Leake*, 2d ed. 887.

³ *Wentz v. DeHaven*, 1 S. & R. 312;

⁴ *Supra*, §§ 996, 1001 *et seq.*; *Lodge v. Dicas*, 3 B. & Ald. 611; *Taylor v. Manners*, L. R. 1 Ch. 48; *Warren v. Walker*, 23 Me. 458; *Munroe v. Perkins*, 9 Pick. 298; *Shaw v. Pratt*, 22 Pick. 308; *Foster v. Purdy*, 5 Met. 442; *Farley v. Thompson*, 15 Mass. 18; *Dearborn v. Cross*, 7 Cow. 48; *Merrill v. R. R.*, 16 Wend. 586; *Whitehill v. Wilson*, 3 Pen. & W. 405; *Snevily v. Reed*, 9 Watts, 396; *Montgomery v.*

Lampton, 3 Met. Ky. 519; *White v. Walker*, 31 Ill. 422.

⁵ *Supra*, §§ 852 *et seq.*

⁶ *Supra*, § 997; *infra*, § 1040; *Foster v. Dawber*, 6 Exch. 839; *Lodge v. Dicas*, 3 B. & Ald. 611; *Bender v. Sampson*, 11 Mass. 42; *Crawford v. Millpaugh*, 13 Johns. 87; *Dambmann v. Schulting*, 75 N. Y. 55; *Whitehill v. Wilson*, 3 Pen. & W. 405; *Snevily v. Reed*, 9 Watts, 396; *Montgomery v. Lampton*, 3 Met. Ky. 519. See *Heckman v. Manning*, 4 Col. 543.

⁷ See *Barker v. St. Quintus*, 12 M. & W. 441.

sideration.”¹—By statute in several states releases are to take effect according to the intention of the parties.²

§ 1033. To constitute a valid release no special form of words is requisite. A covenant not to sue indefinitely or never to sue bars the creditor, though not technically a release;³ and so with expressions to the effect that the creditor is no longer to hold the claim to be in force.⁴ An acknowledgment of satisfaction has the same effect;⁵ and so has a covenant to save the debtor harmless from the debt.⁶ But a letter, written by a woman to a man after the latter has broken his engagement to marry her, in which she says: “I don’t want you,” but which contains a threat holding him responsible at law for his breach of promise, will not be regarded as a release.⁷

§ 1034. Supposing a release to be operative, it discharges, if general, the debt with all damages and costs.⁸ A release, therefore, by a son of his future interest in his father’s estate, has been held to be effectual when made intelligently and fairly, and with the approval of the father; and such a release, it has been held, precludes the son from afterwards claiming either as heir or devisee.⁹ But ordinarily a mere possible future interest or bare expectancy is not the subject of release.¹⁰ It is otherwise “in all cases where there is an existing obligation or contract

No special words required to constitute.

Release discharges debt and incidents.

¹ Leake, 2d ed. 925; citing Byles on Bills, 9th ed. 190.

² Richardson v. McLemore, 5 Bax. 586; Smith v. Gayle, 58 Ala. 600.

³ Ch. on Con. 11th Am. ed. 1146; Ford v. Beech, 11 Q. B. 871; White v. Dingley, 4 Mass. 433; Sewall v. Sparrow, 16 Mass. 24; Cuyler v. Cuyler, 2 Johns. 186; Jackson v. Stackhouse, 1 Cow. 122; Hamaker v. Eberley, 2 Binn. 510; Clark v. Russell, 3 Watts, 213; Clopper v. Bank, 7 Har. & J. 92; Reed v. Shaw, 1 Blatchf. 245; Guard v. Whiteside, 13 Ill. 7. As to covenants not to sue, see *infra*, § 1036; as to releases thereby of joint debtors, *supra*, § 881.

⁴ Hastings v. Dickerson, 7 Mass. 153;

Bac. Abr. Release, A.; 2 Williams’s Saund. 471; Shad v. Pierce, 17 Mass. 623; Phelps v. Johnson, 8 Johns. 54.

⁵ Com. Dig. Release, A. I.; White v. Dingley, 4 Mass. 433; Jackson v. Stackhouse, 1 Cow. 122; Clark v. Russell, 3 Watts, 213; Guard v. Whiteside, 13 Ill. 7.

⁶ Clark v. Bush, 3 Cow. 151.

⁷ Wagenseller v. Simmers, 97 Penn. St. 465.

⁸ 2 Ch. on Cont. 11th Am. ed. 1149; Co. Lit. 291; Bac. Abr. Release, I.; Baker v. Heard, 5 Exch. 959; Veazie v. Williams, 3 Story, 611; Deland v. Man. Co., 7 Pick. 244.

⁹ Curtis v. Curtis, 40 Me. 24.

¹⁰ Pierce v. Parker, 4 Met. Mass. 80.

between parties, although such obligation or contract is executory or dependent upon contingencies that may never happen; still, if the party in whose favor such obligation or contract is made, or who is liable, by force of it, to suffer damage if it is not performed by the other when the contingency happens, shall execute a release of all claims and demands, actions and causes of action, etc., correctly in point of form, and having at the time of executing the release such obligation and contract in view, as one of the subjects upon which the release shall operate, then such release shall be held as a good and valid bar to any suit which may be afterwards brought upon such obligation or contract, or for money had and received, or paid, upon the future happening of the contingency in consequence of which the plaintiff sustains damage, and but for such release would have had a perfect right of action."¹—A release in full for all demands throws on the party alleging an exception, the burden of proving such exception.²—After a debt has been discharged by a release, it cannot be revived by a subsequent promise to pay without a new consideration.³

§ 1035. A court of equity, according to the old practice, would restrain a release to its specific object if its general terms were such that it would be inequitable to give them effect; and the same jurisdiction is now assumed in the common law courts in England under the judicature act,⁴ and in those courts in this country in which equity remedies are applied through common law forms.⁵ "A release," such is the rule, "shall not be construed as applying to something of which the party executing it was ignorant."⁶ So extrinsic proof will be admissible to restrain the effect of a release under seal when it appears that the

Releases
will be
equitably
restrained.

¹ Hubbard, J., *Pierce v. Parker*, 4 R. R. v. Blackmore, L. R. 4 H. L. 623; Met. Mass. 80. *Turner v. Turner*, L. R. 14 Ch. D. 829;

² *Curley v. Harris*, 11 Allen, 112; *Brooks v. Sutton*, L. R. 5 Eq. 361.

see *Dooley v. Ins. Co.*, 3 Hughes, C. C. 221. ³ *Sidwell v. Evans*, 1 Pen. & W. 385; *Wentz v. De Haven*, 1 S. & R. 312.

⁴ *Supra*, § 513.

⁵ Leake, 2d. ed. 923; see *Lyall v. Edwards*, 6 H. & N. 337; London, etc. ⁶ *Wilde, J., Lyall v. Edwards*, 6 H. & N. 337.

release was based on concurrent mistake.¹ But unless fraud be shown, or such concurrent mistake as would lay a basis for rectification, parol proof to restrain a release is inadmissible.² To set aside a release, therefore, when solemnly executed, a clear case of fraud or of mutual mistake must be made out.³ But releases made on the basis of accounts erroneously footed up will be corrected so as to adapt them to the true state of facts.⁴ And a release obtained by fraud will be treated as a nullity.⁵

§ 1036. We have just seen⁶ that a covenant not to sue without limit as to time may preclude further suit. We have next to observe that a covenant not to sue for a limited time does not bar an action on a contract, though it may be, according to modern practice, ground for injunction or stay of execution, or, if the creditor's claim be on a specialty, and judgment be entered, there may be a cross suit on the covenant not to sue, supposing such covenant be independent of and subsequent to the specialty.⁷ Where the covenant not to sue for a limited time, however, is part of the contract, then it qualifies the contract, and no suit can be brought on the contract within the period limited.⁸ And when a covenant not to sue for a limited time provides for forfeiture on the contingency of breach, this is said to operate as a release.⁹—We have already seen that the release of one joint debtor releases all, though it is otherwise with a covenant not to sue.¹⁰ “But although an agreement not to sue one or more

¹ *Morancy v. Quarles*, 1 McLean, 195; *Learned v. Bellows*, 8 Vt. 79; see *Rich v. Lord*, 18 Pick. 322; *Jackson v. Stackhouse*, 1 Cow. 122.

² *Brooks v. Stuart*, 9 A. & E. 854.

³ *Bowles v. Stewart*, 1 Sch. & L. 209; *Phillips v. Clagett*, 11 M. & W. 84; *Rawstorne v. Gandell*, 15 M. & W. 304; *Eastman v. Wright*, 6 Pick. 316; see Wh. on Ev. § 1063.

⁴ *Millar v. Craig*, 6 Beav. 433; see *Skilbeck v. Hilton*, L. R. 2 Eq. 587; *Brooke v. Haymes*, L. R. 6 Eq. 25; see Wh. on Ev. §§ 1064, 1130, 1385.

⁵ Wh. on Ev. §§ 931, 1009, 1019; *Eagle Co. v. Defries*, 94 Ill. 598.

⁶ See *supra*, § 1033.

⁷ *Ford v. Beach*, 11 Q. B. 852; *Webb v. Spicer*, 13 Q. B. 886; *Thimbleby v. Baron*, 3 M. & W. 210; *Gibson v. Gibson*, 15 Mass. 112; *Foster v. Purdy*, 5 Met. Mass. 442; *Fullam v. Vallentine*, 11 Pick. 159; *Winans v. Huston*, 6 Wend. 471; *Clopper v. Bank*, 7 Har. & J. 92; *Guard v. Whiteside*, 13 Ill. 7; and other cases cited in Ch. on Cont. 11th Am. ed. 1147.

⁸ *Foley v. Fletcher*, 3 H. & N. 769.

⁹ *White v. Dingley*, 4 Mass. 433.

¹⁰ *Supra*, §§ 831, 881, 949, 998.

of several joint contractors or joint wrong-doers, made upon a sufficient consideration, is not a technical release or discharge of the debt due or of the damages sustained, yet, to avoid circuity of actions, the party with whom the agreement has been made may set it up as a bar of an action brought against him alone for such debt or damages."¹

§ 1037. The rules for the construction of releases are the same as those for the construction of other contractual documents;² it being kept in mind that in a release, when a unilateral document, if there are two equally probable constructions, that telling most against the releasor will be adopted.³ But at the same time, when there are general terms followed by special, the special are to be taken as limiting the general.⁴ "It is now a general rule in construing releases, especially where the same instrument is to be executed by various persons standing in various relations, and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears by the consideration, by the recital, by the nature and circumstances of the particular demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And, for the purpose of ascertaining that intent, every part of the instrument is to be considered."⁵ Where, for instance, a debtor covenanted with all his creditors to pay a designated composition, in consideration whereof the creditors released the debtor from all actions, debts, contracts, etc., it was held that the general words of the release were to be

Release to be construed according to intention.

¹ Taylor, J., *Ellis v. Esson*, 50 Wis. 145, citing *Lacy v. Kynaston*, 2 Salk. 575; 1 Pars. on Cont. 28, note i; see *supra*, §§ 831, 1033.

² *Supra*, §§ 627 *et seq.*

³ See *supra*, § 670; *Solly v. Forbes*, 2 B. & B. 38; *Morley v. Frear*, 6 Bing. 547.

⁴ *Supra*, § 664.

⁵ Shaw, C. J., *Rich v. Lord*, 18 Pick. 325, citing *Payler v. Homersham*, 4 M. & S. 423; *Solly v. Forbes*, 2 B. & B. 38; *Jackson v. Stackhouse*, 1 Cow. 126; and, to same general effect, see *Tetley v. Wanless*, L. R. 2 Ex. 21, 275; *Bailey v. Bowen*, L. R. 3 Q. B. 133; *Latter v. White*, L. R. 5 Q. B. 622; *Leonard v. Bellows*, 8 Vt. 79.

restrained by the general provisions of the deed.¹ On the other hand, formal expressions of release are to be construed so as to bear solely on the specific items to be released.² But, unless there be such special restraint, the general terms of the release will be held operative.³

§ 1038. As is elsewhere seen, a release by one joint promisor operates to discharge a debt;⁴ and a release of one debtor discharges all the debtors.⁵—A release by a party holding a merely legal and formal ownership of a debt will not be permitted to affect a party beneficially interested, so far as concerns parties with notice, supposing that the release was made without the knowledge and assent of the party beneficially interested.⁶ But at law a release by a party beneficially interested will not bar a suit by the party holding the legal title.⁷—After a debt has been assigned and notice of the assignment given to the debtor, the assignor loses the power of releasing it.⁸—One partner will not be permitted, in fraud of his co-partners, to release a debt due the partnership as a set-off for a debt due by him individually; and a release based on such a consideration will not be permitted to stand in the way of a collection of the partnership debt.⁹

¹ *Gresty v. Gibson*, L. R. 1 Exch. 112.

² *Lyall v. Edwards*, 6 H. & N. 337; *Payler v. Homersham*, 4 M. & S. 426; *Hazelgrove v. House*, L. R. 1 Q. B. 101; *Dunbar v. Dunbar*, 5 Gray, 103; *Noble v. Kelly*, 40 N. Y. 415.

³ *Sherburne v. Goodwin*, 44 N. H. 271; *Rice v. Woods*, 21 Pick. 30. In a composition deed, a general release is to be limited by the recital of the particular line of debts on which it is meant to operate. *Hazelgrove v. House*, L. R. 1 Q. B. 101; *Gresty v. Gibson*, L. R. 1 Ex. 112. A release of a debtor owing a separate debt, but owing also to the same creditor a partnership debt, will be held to apply to the separate debt. *Kirk ex parte*, L. R. 5 C. D. 800.

⁴ *Supra*, §§ 821, 950, 998.

⁵ *Supra*, §§ 831, 980, 998.

⁶ *Crook v. Stephens*, 5 Bing. N. C. 688; *Howard v. Baillie*, 2 H. Bl. 618; *Herbert v. Pigott*, 2 C. & M. 384; *Mount Stephen v. Brooke*, 1 Chit. 390; *Barker v. Richardson*, 1 Y. & J. 362; *Manning v. Cox*, 7 Moore, 617; *Sprague v. Gillett*, 9 Met. (Mass.) 91; *Eastman v. Wright*, 6 Pick. 323.

⁷ *Quick v. Ludborrow*, 3 Bulst. 29; *Walmesley v. Cooper*, 11 A. & E. 216; see Story on Cont. §§ 1397 *et seq.*

⁸ *Hackett v. Martin*, 8 Greenl. 77; *Matthews v. Houghton*, 1 Fairf. 420; *Eastman v. Wright*, 6 Pick. 322; *Frear v. Evertson*, 20 Johns. 142, see *supra*, §§ 844, 1021–5.

⁹ *Gram v. Cadwell*, 5 Cow. 489; see *supra*, § 1028.

§ 1039. A release may be made dependent upon conditions.¹ If the condition be subsequent, the release operates as a suspension, and the debt revives on the happening of the condition. This is the case with deeds of composition containing releases with the proviso that if there be default in the payment of the composition the release is to be inoperative.² Of conditions precedent we have illustrations in deeds of composition in which the release is not to take effect until certain payments are made, or certain contingencies take place.³

Release
may be con-
ditional.

§ 1040. As has already been seen,⁴ a release may, before breach, be by novation, *i. e.*, by extinguishing of an old unperformed contract by substituting a new contract in its place. In such cases the original debtor is released on the acceptance of the substituted debtor. And, as we have also already seen,⁵ indebtedness in an informal or parol contract may be released by its merger in a security of greater solemnity. Prior informal conferences are thus merged in written contracts,⁶ and simple contracts are merged in sealed contracts when meant to cover the same ground.⁷ But this effect is not produced when the sealed document is taken as a collateral, as when a specialty executed by a surety is received.⁸—When a new is adopted in the place of an old agreement, the substitution being meant to be entire, then the old is extinguished.⁹ And where a contract of service was terminated by one party resigning and the other accepting the resignation, there being no provision made for any future settlement, and no recognition of any past indebtedness, it was held that the employee could not sue the employer

Release
may be by
novation
and merger

¹ *Supra*, §§ 548 *et seq.*

⁵ *Supra*, §§ 5, 643; Wh. on Ev. § 1014.

² *Newington v. Levy*, L. R. 6 C. P. 180; *Hall v. Levy*, L. R. 10 C. P. 154; see *supra*, § 608.

⁷ *Supra*, § 683.

³ *Walker v. Nevill*, 3 H. & C. 403; *Corner v. Sweet*, L. R. 1 C. P. 456; *Gibbons v. Vouillon*, 8 C. B. 483. And see *supra*, § 545 *et seq.*

⁸ See *supra*, § 684; *Tarr v. Northey*, 17 Me. 113; *Charles v. Scott*, 1 S. & R. 294; *Sterling v. Rogers*, 25 Wend. 658, and cases cited Ch. on Cont. 11th Am. ed. 1161.

⁴ *Supra*, §§ 852 *et seq.*, 1003 *et seq.*

⁹ See as to novation, *supra*, §§ 852 *et seq.*; and also, as to rescission by parol, *supra*, § 661.

⁶ *Supra*, § 684.

on the old agreement for a *pro rata* apportionment of salary which might have been due between the last day fixed for payment and the resignation.¹

§ 1041. A party who either makes or permits a material alteration in a document under which he claims title, is precluded from using such document as evidence.² The burden is on the party producing an altered document to explain the alteration;³ but should the alterations prove to have been merely accidental, or to have been trivial, or to have been made during negotiation, they do not affect the rights of the party to claims on the document, supposing it to be legible.⁴

§ 1042. When an agreement provides for immediate action, and no action is taken under it, and when the position and character of the parties are such that it would be very unlikely that the agreement would lie thus dormant unless it was understood by them that it was abandoned, then, after a lapse of time so long as to admit of no other rational explanation, it will be presumed to have been rescinded by consent.⁵

¹ Lamburn v. Cruden, 2 M. & G. 253; see Grimman v. Legge, 8 B. & C. 324.

² See *supra*, §§ 696 *et seq.*

³ *Supra*, § 698.

⁴ *Supra*, §§ 696 *et seq.*

⁵ Rushbrook v. Lawrence, L. R. 5 Ch. 3; Mills v. Haywood, L. R. 6 C. D. 196.

CHAPTER XXXIV.

NEGLIGENCE IN CONTRACTING.

Non-existence of valid contract does not preclude action for negligence, § 1043.	Party cannot take advantage of his own negligence of expression, § 1050.
Liability of party to void contract affirmed in Roman law, § 1044.	Redress for verbal mistakes, § 1051.
Party may recover back expenses on void contract, § 1045.	Party employing an agent is liable for the latter's negligence, § 1052.
And may recover damages, § 1046.	Contributory negligence to be taken into account, § 1053.
Infants' liability to suits of this class, § 1047.	Agent liable for unauthorized action, § 1054.
So as to lunatics and drunkards, § 1048.	And so of parties advertising rewards, or making public offers, § 1055.
Liability when contract is avoided from mistake as to object, § 1049.	And so of telegraph companies, § 1056.

§ 1043. It has been shown in a prior chapter that there are several lines of cases in which bargains which are on their face contracts are held to have no contractual force. A bargain made by an infant, for instance, may be repudiated by him when he arrives at full age.¹ Proposals may be accepted in a sense so utterly different from that in which they were meant, that no contract between the parties can be held to exist.² A party who negligently and erroneously supposes he is duly authorized to act for another cannot bind such other person by any contract, no matter how solemn.³ But though in such cases no contractual obligations are formed, the party in negotiating with whom another is thereby misled is liable to such other for the damages he sustains in consequence of the miscarriage of the negotiation. It is elsewhere seen that

Non-existence of valid contract does not preclude action for negligence.

¹ *Supra*, § 31.

² *Supra*, §§ 180 *et seq.*

³ Wh. on Ag. §§ 454 *et seq.*

this has been held to be the case with regard to assertions of full age made by an infant to a party who has good reason to rely on the truthfulness of the assertions.¹ We will now proceed to inquire how far such liability may be imposed on those by whose negligence in negotiations others are misled.²

¹ *Supra*, § 53; *infra*, § 1047.

² Mr. Bigelow (Leading Cas. in Torts, 614) says: "A carriage-maker allows the plaintiff to buy a carriage with a view of effecting a sale; and, owing to negligence in its construction, the carriage breaks down, and injures the plaintiff. This is a good cause of action, and yet there was no contract." But does not a proposal to deliver on trial, when the thing is accepted on the condition designated by the owner, constitute a contract? Waiving, however, this criticism, it is enough to say that where there is the fact that a conditional bargain is proposed and accepted, then damages may be obtained for the negligent breach of the contract.

Wherever a contract establishes a duty, then the party for whose benefit the duty is to be performed can sue for negligence in its performance. Wh. on Neg. § 435; Addison on Torts, Wood's ed. 527, citing *Bowman v. Brown*, 3 Q. B. 526.

"If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action, on the faith that the act will be duly and properly performed, shall not suffer loss or injury by reason of his negligence." Bigelow, C. J., *Sweeney v. R. R.*, 10 Allen, 368; adopted by Hoar, J., in *Coombs v. New Bedford Cord Co.*, 102 Mass. 572.

"I am, however, disposed not quite to acquiesce to the full extent in the proposition that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct." Pollock, C. B., *Rigby v. Hewitt*, 5 Exch. 243.

"Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties; but where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well-established and ancient doctrine of the common law, and such a liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. This same rule of law is sanctioned and enforced in *Rigby v. Hewitt*, 5 Exch. 242;" McDonald v. Snelling, 14 Allen, 290.

The question in the text is discussed by Bähr, in *Ihering's Jahr.*, vol. xiv. 393, in connection with the following case: A Cologne house sent to a tele.

§ 1044. The liability of a party who by his negligence leads another into a prejudicial negotiation of this class,

graph office the following dispatch, addressed to a Frankfort house: "*Sell* (Verkaufen) 1600 shares Austrian loan," etc. The message was changed in transmission into "*Buy* (Kaufen)," etc.—The Frankfort house, instead of selling, bought the number of shares designated, which in the mean time fell heavily in the market. According to the strict rule of the Roman law, as prevailing in Germany, there was no contract between the Cologne and the Frankfort houses; and it was consequently argued that the loss must fall on the Frankfort house. The court, however, thought otherwise; holding that if there was any negligence in the Cologne house, it must bear the loss; though if the negligence was that of the telegraph company the latter must ultimately be responsible—This is substantially adopting the rule of the text. and the same distinction is taken by Vangerow, § 109, and Windscheid, § 307, and is sustained by several German adjudications. Seuffert, Archiv, Bd. 21, N. 29. Bähr proposes another solution of the difficulty: The rule that there is no contract where there is no actual union of minds as to a specific thing, cannot be sustained, he argues, if we view the mind only subjectively, limiting ourselves to its inner operations. The intention can only be measured by the outer expression taking the form of words or signs; and a party using such words or signs precludes himself from denying that they have the meaning they ordinarily bear. Hence the principle that a party will not be permitted to deny that he is bound by expressions by dependence on which another party dealing with him contractually suffers detriment. The party who uses such expressions un-

designedly is bound to the same effect as if they had been actually designed. (Er haftet aus der äusseren Erscheinung seines Willens gerade so, als ob er wirklich gewollt habe.) Bähr admits that this rule (which is substantially that of equitable estoppel as maintained in our own jurisprudence) is not to be found explicitly stated in the Roman classical standards. He argues, however, that the rule is practically recognized in numerous cases, of which he cites the following:—

1. The prior revocation of a mandate does not cancel a contract made by the agent with a *bona fide* purchaser, who was notified of the mandate but not of its revocation.

2. The same rule is adopted as to the *institor*. Business contracts made by the *institor* bind the principal to parties dealing *bona fide* and non-negligently with the institor, though it may happen that the institor's authority has been secretly revoked by the principal before the transaction.

3. Contracts made in pursuance of a general power of attorney, also, are not made inoperative by the fact that prior to the contract the powers of the attorney were secretly recalled.

4. A party who contracts with a public institution, accepting, for instance, proposals published by such institution, is bound by the limitations of such proposals, though he may not have acquainted himself with their details. There was no actual concurrence of minds, though there is a contract. In this, as in the prior cases, we have to resort to the fiction of concurrence—the "*Einwilligung wird fiktirt*."

5. So of a party coming to a public auction after the conditions of sale have

Liability of party to void contract affirmed in Roman law. is maintained with great skill and force by Ihering, a distinguished German jurist.¹ The prevalent doctrine that essential error avoids a contract, he accepts; but he urges that the party causing the error should

been read. The fact that such a party is not cognizant of these conditions does not relieve him from them should he purchase at the sale.

6. A party, also, who signs a document, will not, as against a *bona fide* purchaser or holder, be permitted to say that he did not know what the document contained.

7. No matter how solemnly a party may protest in private that he is not bound by a contract duly executed by him, this mental reservation is no defence.

8. Questions of interpretation are questions of intention (Interpretationsfragen sind Willensfragen). But this intention is not to be divined by the adjudicating tribunal on purely subjective grounds. The logical interpretation, so Ihering argues, rests on the hypothesis that the true intention is cognizable, both by the other party and by the court. The court cannot take notice of facts which were not known and could not have been known to the other party. The test is, not what the party making the proposal meant, but what the other party must, under the circumstances, have supposed him to have meant. It is maintained by Bähr that this is equivalent to saying that a proposal is to be determined not by the party's private intention, but by the outer appearance (*äusseren Erscheinung*) of the particular case, and the requisite intention is inferred from the facts, so that when not actually existing (*vorhanden*) it is feigned (*fingirt*).

It is conceded by Bähr that a party, in order to set up his *bona fide* interpretation of a proposal, must have acted non-negligently and fairly. In other words, the fiction of a non-existing intention on the part of the proposing party can only be set up by a party accepting non-negligently and in good faith. On the other hand, the party proposing cannot relieve himself from liability by setting up *bona fides*.

In the text (*infra*, § 1051) is given the case of a singer who is engaged by the director of a theatre in mistake for her sister, in which case Ihering, on the assumption that the engagement does not constitute a valid contract on account of essential error as to the object of the contract, maintains that the director is bound to reimburse the singer on the ground of *culpa in contrahendo*. Bähr, on the other hand, holds that if the singer entered into the contract non-negligently and honestly, the director is bound. Bähr calls attention to errors in respect to currency, and says that in such matters the local meaning must prevail, no matter what may have been the intention of one of the parties; and this is undoubtedly so unless the intention is based on the mistake of such party, such mistake not being shared by the other party. Bähr goes on to say, with much acuteness, that nullity on account of essential error as to object is limited to cases where the error was more or less open to inspection, so that each party is to blame, and neither party should have placed on him the burden

¹ Gesammelte Aufsätze, von Rudolph von Ihering, Bd. 1, Jena, 1881.

be made liable for the consequences. If this be not conceded, not only injustice, but "practical hopelessness" would follow.

of a contract as to which both should have seen there was an essential misapprehension. Cases of this class, however, are not frequent, which accounts for the rarity of the decisions in which contracts are annulled on account of essential errors. Thousands of suits, so he states, depend each year on the question of the intention of the parties to a contract. One party maintains that he meant one thing: the other party maintains that he meant another thing. Now, if contracts are nullities when the contracting parties have different intentions, why do we not have in such cases rulings, as numerous as the cases, that no contract existed? So far from such being the case, Bähr declares that every practitioner will concur with him in the statement that such decisions are, as a rule, unknown. In his own long practice, he states that he was concerned in but a single case in which a contract was annulled on account of essential error. A painter (Färber) in Kassel made inquiries, in 1842, of a merchant in Hanover for indigo. The merchant sent samples, designating the price per pound. The painter ordered three boxes at the designated price, "pr. dortiges Gewicht." In Hanover, down to 1835, a heavier standard obtained; in that year the lighter Cologne standard was adopted. The purchaser, on receiving the goods, refused to pay, on the ground that on giving the order he had the old Hanover heavy standard in mind, while the vendor had delivered according to the lighter standard. The appellate court held that the contract was a nullity on account of error in object; but this, as Bähr argues, may be sustained on the ground that the vendor was bound to have known what

the purchaser meant by "dortiges Gewicht." Bähr states that this is the only case of annulling on ground of error to be found in the German reports of Seuffert or of Strippelmann. In other words, he argues, the rule as to error, though speculatively true, is of very rare practical interest, since the cases are almost unknown in which a party who makes an error is not (supposing there be no fraud) precluded by his own negligence from setting it up. And this coincides with our own rule of equitable estoppel. A party who, by his negligent error, leads another *bona fide* to contract with him, cannot set up his error to avoid the contract.

On the same principle, according to Bähr, are to be explained the numerous German rulings by which a party is made liable to *bona fide* promisees on the letter of a contract, though through a slip of the pen, or the mistake of an agent, words varying the intended meaning are introduced. "He who uses the telegraph," so Bähr argues, "must be aware that mistakes are incidental to this mode of communication, and he cannot therefore relieve himself from liability for the effect produced on others by such an instrumentality, if he puts it in motion."

Bähr concludes his criticism by saying that to the doctrine of *culpa in contrahendo* a serious objection exists in the fact that there is no standard of damages by which the injury sustained by such "culpa" can be redressed. The true standard of damages, he maintains, is that which rests on the hypothesis that the contract is still in force, and which makes the party, therefore, liable on the contract and not on the tort. This does not materially differ

The negligent party would go free: the other party would have to suffer the consequences of the mistake. It is clear, he concedes, that a party who non-contractually and non-maliciously makes erroneous statements, is not liable for the injury sustained by others in consequence of their belief in such statements. I may negligently, for instance, print an erroneous report of the stock-market, or I may negligently publish erroneous political intelligence, but a party who has been injured by my error cannot, for this reason, recover from me damages. It is otherwise, however, if I make an offer to a specific person, or to a certain class of persons, conditioned on something to be done by the party addressed; and this something is done, but after it is done, the proposal turns out to be one on which I am not contractually bound. If by my negligence I have induced another party to perform certain services or incur certain expenses in reliance on my proposal, then, he argues, I am liable to such person for *culpa in contrahendo*. And, according to the Roman law, so he maintains: (1) When a contract is held void in consequence

from the practical results of our own cases. There can be no doubt, that should the question arise we would hold a party liable for *culpa in contrahendo*. At the same time the cases in which such a decision could be invoked would be very rare. Wherever the promisee is induced *bona fide* to act on the letter of the promise, the promisor is estopped from disputing such letter. Wherever the promisee knows that the promisor was acting under a mistake, this is ground for reformation or rescission, which, however, would not be granted unless the promisor does equity by recompensing the promisee, if injured without fault of his own, for such injury.

Dr. G. Hartmann, in an article on Wort und Wille im Rechtsverkehr, in Ihering's Jahrbücher for 1881, vol. xx. p. 2, has an article on the same topic. A prescription is put up, such is the illustration with which he opens, by

an apothecary, who blunders as to the words, so as to give a medicine totally different from that ordered. Of course, according to the prevalent doctrine, there is no contract between the apothecary and the purchaser of the medicine, since they have utterly different things in view: the purchaser ordering soda, for instance, and the apothecary selling arsenic. But the fact of there being no contract would not preclude an action for negligence. On the other hand, that this negligence is *culpa in contrahendo* is shown by the fact that a suit for it can only be maintained by a party bearing some sort of contractual relation with the apothecary.

Liability for *culpa in contrahendo* is asserted by Pothier, Traité des Obligations, i. ch. 1, No. 10. He bases it on "l'équité, qui m'oblige à indemniser celui, que j'ai par mon imprudence induit en erreur."

of error as to the thing bargained for, the negligent party is liable for damages; and (2) a similar liability attaches in cases where the contract is held to be void in consequence of incapacity of the vendor to convey.

§ 1045. The party who is thus disappointed by the negligence of another is entitled, in the first place, to recover expenses which he has been put to in order to perfect the transaction which turns out to be invalid. Under this head Ihering¹ enumerates the expenses of executing a deed, the charges of packing and of freight, as well as all other expenses which a party has incurred in the reception or the transmission of property the sale of which is declared void. As by our own common law money paid on an inoperative or void contract can be recovered back, there is no reason why expenses of this kind, incurred on the faith of a contract declared to be void, should not be with us recovered from the party by whose negligent encouragement they were induced.² The principle is very simple. I am led by A.'s promise to make certain outlays. These can be regarded as made at A.'s request, and on an implied promise of repayment. They can, therefore, be recovered back on the transaction falling through.³

Party may recover back expenses on void contract.

§ 1046. Suppose, however, that the promisee in a bargain, which turns out to be void, loses, in consequence of his dependence on the action of the promisor, some definite gain; can he recover for this loss from the promisor? A vendor, for instance, negligently misstates property he undertakes to sell, and afterwards, on the ground that the parties did not agree as to one and the same thing, the contract is rescinded; can the vendee recover from the vendor damages sustained by the vendee from the vendor's negligence? So far as our own distinctive practice is concerned, it is, in the first place, to be inquired whether a vendor may not, by his negligence, estop himself from claiming a rescission. If, by his negligence, he induced the purchaser to make the purchase, then the vendor may be

Party injured by void contract may obtain damages.

¹ Op. cit. 344.

³ *Supra*, §§ 742-7 *et seq.*

² See *supra*, § 742.

equitably estopped from contesting the title so obtained.¹ It is to be observed, in the second place, that a party claiming to rescind on ground of error must do equity before he can obtain a decree of rescission, and this condition would impose on the party seeking rescission the duty of compensating the other party for any loss the latter may have been subjected to by the negotiation.² Supposing, however, no estoppel is set up, and supposing the question not to come up on proceedings in equity brought by one of the parties to rescind the contract, it is difficult to escape the conclusion that the rule thus recognized in equity would be held good in law, and that a party who had suffered damage by being led by another into a void contractual relation would be held entitled to recover from such other person compensation for the damage so sustained. An auctioneer, for instance, undertakes to sell to the highest bidder, and, according to the rule heretofore expressed, is liable to such highest bidder in case the sale miscarries.³ Would this liability, so far as concerns the purchaser's right to recover for costs and expenses to which he had been thereby subject, cease because the sale was set aside at the vendor's application for misdescription? An insurer issues a policy which, through his own fault, or through accident, contains an essential misdescription. Would it not be required, as a condition precedent to rescission on his application, that he should save the other party harmless?⁴ and if this duty would be imposed on him in one procedure, would it not be imposed on him in all other lines of procedure in which the question might occur? A solicitor undertakes to see that a particular title is good; would it be pretended that, because the contract between the solicitor and the client was inoperative for some technical defect, the solicitor was not liable to his client for negligence?⁵ Is it agreed that actions for negligence will lie on mandates on which, for want of consideration, no contractual suit would lie.⁶ Even supposing that we should reject the Roman rule that a party negligently leading

¹ See *supra*, § 202 *a*.

² *Supra*, §§ 207, 285.

³ *Supra*, §§ 25 *b*, 255, 267.

⁴ *Supra*, § 285.

⁵ *Ireson v. Pearman*, 3 B. & C. 799;
Watts v. Porter, 3 E. & B. 743.

⁶ See Wh. on Neg. §§ 435 *et seq.*

another to enter into a contract that turns out to be void is liable in damages to such other person, we reach a substantially similar result by falling back on the English common law rule that a party who negligently makes an erroneous assertion is liable for the consequences.¹ On this reasoning it has been held that in an action against a telegraph company for delivering a message that was never sent, it is not necessary to allege that the implied statement that the message was given to the defendants to forward was false to their own knowledge.² Another illustration may be found in cases in which it is held that a party who, no matter how honestly, obtains credit on the false statement that he is agent for another, is liable to a suit to repay any damages incurred by a party to whom he makes such statement and who acts on it.³ The same principle, also, is illustrated by the familiar rule that money paid on void securities may be recovered back.⁴ Supposing there was an agreement for the sale of such securities, the agreement would not constitute a contract, as there would be an essential error as to the existence of the thing contracted for. Yet in such cases an action on an implied contract can be maintained against the vendor for money had and received; or an action for deceit or negligence, as the case may be, may be maintained against him for his misstatement of the value of the securities. If the misstatement was malicious, then the action must be for deceit; if it was negligent, then the action must be for negligence.⁵

¹ *Supra*, § 241. It is true that this is sometimes put on the ground of legal fraud. "If a man," says Lord Kenyon, "affirms that to be true within his own knowledge which he does not know to be true, this falls within the definition of legal fraud." *Haycraft v. Creasy*, 2 East, 103; *S. P. Marsh v. Falker*, 40 N. Y. 562. But a suit for negligence can be sustained in all cases of injury by negligent misstatements, which, if intentional, would form the basis of an action for deceit; *supra*, § 214.

² *May v. Union Telegraph Co.*, 112 Mass. 90.

³ *Bigelow on Fraud*, 58, citing *Collen v. Wright*, 8 E. & B. 647; *Cherry v. Bank*, L. R. 3 P. C. 24; *Godwin v. Francis*, L. R. 5 C. P. 295; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Bartlett v. Tucker*, 104 Mass. 336; *White v. Madison*, 26 N. Y. 117, and other cases.

⁴ *Supra*, § 744.

⁵ So far as concerns the question of causal relationship, *McMahon v. Field*, L. R. 7 Q. B. D. 591, may be cited as sustaining the rule stated in the text. In that case the plaintiff supposed he had hired certain stables of the defend-

§ 1047. That an infant may be made liable for negligence in so using his property as to injure another, cannot be ques-

ant, in order to put some horses there which the plaintiff wished to dispose of at a fair held in the town. Soon after the horses arrived they were turned out of the stables in consequence of the defendant having also let the stables to another person, and as the defendant did not supply the plaintiff with other accommodation for the horses, the plaintiff was compelled to obtain it elsewhere. The plaintiff claimed damages for the breach of contract, and alleged that the horses were injured by being thus suddenly turned out of the stables and exposed to the weather while he was seeking other stables for them. The jury gave him 25*l.* for the loss consequent on his not having the use of the stables, and 50*l.* for the injury to the horses. It was held by the English court of appeal in 1881 (Brett, L. J., and Cotton, L. J., concurring, Bramwell, L. J., doubting), that the plaintiff was entitled to damages for the injury to the horses. Brett, L. J., said: "Since the decision in *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J. 179, Ex., the question whether damage is too remote has in my opinion been one of the greatest difficulty. According to the rule in *Hadley v. Baxendale* it must be considered, first, whether the damage was the necessary consequence of the breach of contract, and then whether it was the probable consequence, and then whether it might reasonably be in the contemplation of the parties. The last two questions are really matters of fact, but the courts have to decide them as questions of law. The question here is, did the fact of the horses catching cold come within any part of the rule? It was not the necessary consequence of the defendant's breach of contract, but

I should certainly say that it was the probable consequence if I had to decide the question, and I think it follows that it might reasonably have been in the contemplation of the parties. Here the jury found that the contract had been broken, and that the result of the breach was the damage which the plaintiff suffered. We are asked to say that this is unreasonable, and that the question ought not to have been left to the jury. Now let us consider the facts. The plaintiff brought his horses over from Ireland; he took stabling for twelve horses at Rugley, and arrived at Rugley during fair time, and went into the stables, the horses then having their clothes on. The defendant had let the stables to another man before the plaintiff's arrival, and the other man's horses were in the stables when the plaintiff arrived; thereupon the plaintiff turned those horses out and put his own horses into the stables. Afterward the man who owned the other horses returned, and with the assistance of a servant of the defendant he turned the plaintiff's horses out of the stables, and put his own horses in. No other stabling could then be found for the plaintiff's horses. The defendant knew that these horses had been brought by rail to the fair, and they were turned out hot from the stable. Any one who knew anything about horses would have known that there was a great probability that they would catch cold. So far from thinking as matter of law that this is not a probable consequence, I am convinced as matter of fact that it is. Then there is the decision in *Hobbs v. London and S. W. R. Co.*, L. R. 10 Q. B. 111, which it is contended governs this case. As to that decision I can only say that if I

tioned.¹ Were it not so, all that would be necessary to put an injurious agency or other invasion of the rights of others out of the reach of the law,

Infants
liable for
negligence
of this class

acquiesce in it I cannot bring my mind to agree with it. There a man took tickets for himself and his wife by a midnight train to Hampton Court; his house was two miles off from Hampton Court; he was taken to Esher, which was between four and five miles from his home; could get no conveyance, and he and his wife had to walk home at night in the rain; his wife caught cold, and the judge said that was not the natural consequence of the railway company's breach of contract. Why was the damage there too remote? Take the case of lodgings. Suppose the landlord turned his lodger out on a cold night in her nightgown; would it not be such a natural consequence as to make him liable if she were to catch cold? If he used the least force, and she died, he would certainly be charged with manslaughter. If Esher were known to be a good station, and there had been accommodation at the station which the plaintiffs might have availed themselves of, it would have been their own fault if they had not done so; but there was no such accommodation at the station, they walked, and the wife caught cold. The judges, as a matter of fact and opinion, decided that this was so unnatural a consequence of the railway company's breach of contract that the question could not even be left to the jury. I confess I cannot bring my mind to the same conclusion. Here, however, there is a difference. People do walk home at night and not catch cold; it is not nearly so inevitable a consequence as that horses should catch hold if turned out as these

were. There is a difference between turning horses out at night after a hot journey and leaving people to walk home at night. Still *Hobbs v. London and S. W. R. Co.* is so near the line that in any other case, unless the circumstances were exactly the same, I should distinguish it. I am therefore of opinion that the appeal ought to be allowed, and in so deciding we are not overruling *Fry, J.*, except in mere form, for he only yielded to the decision of the queen's bench in *Hobbs v. London and S. W. R. Co.*, and his own opinion was that the plaintiff was entitled to these damages." See discussion in *Central Law Journal*, June 24, 1881, p. 583.

In *Neilson v. James*, 46 L. T. N. S. 791, the liability of a party for negligence in contracting was incidentally affirmed by the English court of appeal. By an act of parliament (*Leeman's act*) contracts for sale of bank shares are null and void to all intents and purposes whatsoever unless the contract shall set forth in writing the shares by their numbers, or where there is no register of shares by distinguishing numbers, and the name of the registered proprietor of the shares. In the case before the court the plaintiff employed the defendant, a stock broker, to sell bank shares. The defendant agreed with a jobber to sell the shares to him, but did not comply with the provisions of the statute. Before the name-day the bank failed, and the jobber refused to take the shares. In an action for negligence in not making a binding contract for the sale of the shares, the de-

¹ See *Wh. on Neg.* §§ 310, 322.

would be to convey the property from which it springs to an infant. A mill-dam, for instance, is so negligently constructed as to flood a neighbor's fields, or a mine so negligently worked as to injure a mine on a lower level, or a building is so negligently constructed as to hurt a passer-by; and if infant owners were not responsible for such damage, not only would many injuries remain unredressed, but there would be a temptation to place all enterprises involving risks to society in the hands of infants. If, however, an infant is liable for negligent management of one kind of property, it is hard to see why he should not be made liable for negligent management of another kind of property. An obligation is as much a valuable thing as land; it is taxable; it has a local seat; the fact that it is voidable does not destroy liability for its misuse any more than the fact that a conveyance of land is voidable does not relieve a party in possession under a deed subsequently avoided from liability for injury to others caused by his mismanagement of the lands when in possession. It is objected, it is true, to this view, that if it be maintained, (1) an infant is virtually made liable on a contract, which is contrary to a settled rule of law; and (2) the protection the law affords to infants from improvident bargaining would be illusory. The first objection, as is well remarked by Ihering, rests on a *petitio principii*, since the very question at issue is whether the claim in litigation is contractual. If it is not, then it can be maintained, so far as the present objection is concerned, since an infant is beyond doubt liable in tort. As to the second objection, it is replied by Ihering that its force is very much diminished by the fact that the cases in which such suits could be set up are comparatively rare, and based on strong equities. We would have, at the outset, to put out of the question all cases in which the ap-

fendant set up as a defence a custom of the Bristol Stock Exchange to sell shares without complying with the statute. It was held that such a custom was unreasonable and illegal, and was not binding on plaintiff, and, therefore, that the defendant was liable for the amount which plaintiff would have received for the shares if the contract of sale had been binding. Lord Coleridge, C. J., Brett, and Cotton, JJ., concurred, reversing in this point the ruling of Stephen, J.

pearance of the minor gives the party dealing with him ground to suspect his minority. Although an infant would be liable, on general principles, to a suit for negligence, yet when the basis of the suit is negligence in the defendant in permitting himself to be regarded as an infant, the plaintiff, who had reason to suspect such infancy, and did not inquire into it, would be barred by his contributory negligence from pressing his suit. The line of suits of this class would be contracted to the few cases in which an infant deals with a party *bona fide*, believing him to be of full age. If an infant as to such parties has certain prerogatives, then he is liable for the abuse of such prerogatives. If he can make a valid endorsement of negotiable paper,¹ then he is liable for the negligent making of such endorsement. If he would have been liable on a contract supposing he was, what he appeared to be, of full age, then he is liable for negligence in case he negligently conceals the fact of his minority, the other party having no reason to suspect the truth.²

§ 1048. The same distinctions may be taken as to other forms of mental incapacity. Unless there be some positive statute in the way, a contract made *bona fide* with a lunatic, without notice of his incapacity, will be enforced.³ This is *a fortiori* the case with drunkards. A man may be so sottishly drunk that it would be a fraud to engage him in business; yet if he endorses a promissory note, he will be bound to a *bona fide* holder who takes it without notice.⁴ A person once a lunatic cannot set aside a contract made by him when his mind was clouded without doing equity; and if he had sense enough when he made a bargain to conceal all traces of insanity so that the other contracting party did not suspect such insanity, he cannot have the contract rescinded without paying back any expenses the other party may have incurred in consequence of the transaction. So a party cannot ask to rescind on the ground of

So as to lunatics and drunkards.

¹ See *supra*, § 66.

² So far as concerns malicious injuries, we have already seen that while an infant cannot be made liable on a contract declared on as a tort, it is

otherwise when the suit is for damages incurred by deceit when the suit is not based on contract. See *supra*, §§ 52-3

³ See *supra*, § 106.

⁴ See *supra*, § 118.

drunkenness without offering to repay any damages incurred by the other side. And in general, a party who is compelled to repay before maintaining a bill for specific performance, should be compelled to reimburse in a suit brought against him for negligence.

§ 1049. We have already incidentally noticed the question whether, when a contract fails from mistake as to its object,¹ the party negligently making the mistake is liable for the damage thereby sustained by the other side. The Roman law affirmed this liability in several conspicuous relations. A free-man, for instance, is sold in mistake for a slave. The sale is void; the contract is a nullity; yet, nevertheless, the party undertaking to sell is bound to reimburse to the party undertaking to buy the expenses sustained by the latter.²—In the same category the Roman law places contracts failing from the non-existence of the object. Such non-existence of a thing assumed by both parties to be existing may occur in cases where the thing never existed at all, or in cases where having existed it has ceased to exist. In the last of these cases the promisor either knew or did not know the fact of the non-existence. If he did, then he is liable in an action of deceit, if not in an action on a guaranty,³ while no such action would lie should the promisee know of the non-existence.⁴ Supposing, however, that a party sells a non-existent thing of whose non-existence he ought to have had notice, then he becomes liable for any injury to the other party which his ignorance may have caused. A ship-owner, for instance, sells a ship which is at the time of the sale lost at sea, of which loss the vendor, had he exercised due diligence, would have been aware. In this case the owner would be liable to the other party for the loss accruing to the latter by the disappointment.⁵ It is true that, in cases where the consideration fails, the money paid may be recovered back;⁶ but this would not preclude the party injured from suing in tort where there

Liability
when con-
tract is
avoided
from mis-
take as to
object.

¹ See *supra*, §§ 186 *et seq.*

² Ihering, *ut supra*, Aufsätze, 383—4.

³ See *supra*, §§ 302, 315.

⁴ *Supra*, § 303.

⁵ See *supra*, §§ 309 *et seq.*

⁶ *Supra*, §§ 742 *et seq.*

was a tort.¹ The same distinction applies to sales of patent or other rights. A vendor negligently sells that to which he has no title. If so, he is liable (irrespective of the question of warranty or other contractual duty) for any damage caused by his negligence.² It is otherwise, however, when the thing which is sold, though not existing in the power of the vendor at the time of the contract, could be procured by him. In such case the vendor is bound to procure the article, and is liable, not for damages, but contractually for the article itself or its value.³ But however this may be, we have to fall back, in respect to contracts inoperative from essential error as to parties or object, on the rule that, wherever a party seeking to rescind would be required to refund or reimburse the other party before proceeding in his suit, there he may be compelled to refund or reimburse in an action by the other party. The process of recovery may be in an action of money had and received.⁴ But, if there be a tort involved, he may be held in a suit for damages based on the tort.⁵

§ 1050. In the Roman law, a party who uses wrong words in an obligation he enters into is liable, in case he be relieved from the obligation in consequence of such mistake, for any damages his negligence may have inflicted on the other party.⁶ In our own law, injustice is prevented in this respect in other ways.

Party cannot take advantage of his negligence of expression.

In the first place, a party seeking to rectify or rescind would not be heard unless he equitably reimburses the other party.⁷ In the second place, a party is estopped, as against *bona fide* purchasers or promisees, from setting up his own negligence.⁸ A party, for instance, who leaves a blank in a paper signed by him cannot complain if this blank is filled up by a party to whom he intrusts it in a way he did not intend.⁹ But aside from these remedies, a party who by his carelessness in dealing with another inflicts injury on such other, there being

¹ *Supra*, §§ 282 *et seq.*

⁶ *Ihering*, op. cit. 390.

² *Ihering*, op. cit. 388; see *supra*, § 230.

⁷ *Supra*, § 285.

⁸ *Supra*, §§ 262 *a*, 908.

³ See *supra*, § 315.

⁹ See *supra*, §§ 186, 202 *a*, 688, 697

⁴ See *supra*, §§ 742 *et seq.*

et seq., 795.

⁵ See *infra*, §§ 1054 *et seq.*

privity between the two, is liable for such injury.¹ He may be liable on such negligence if sued by a party thereby damaged; or he may be precluded from recovering damages from other parties when the damage he complains of was induced by his own negligence.²

§ 1051. Ihering supposes the case of two singers of the same name, one of whom the director of a theatre desires to engage. His letter, owing to his negligence, falls into the hands of the wrong party, who at once accepts the proposal. Supposing the two singers to have capacities utterly distinct, the one accepting being incapable of filling the part designed for the other, it is plain that there is here no contract for which a bill of specific performance would lie; nor would a salary meant for the one singer be recovered by the other. But while this is the case, it is equally clear that the director would be liable for any expenses to which the party addressed had been put by his negligence in addressing the letter.—In our own practice, a party who at another's request incurs certain expenses, is entitled, if a promise can be inferred from the facts, to be reimbursed.³ And, as we have seen, and will hereafter see more fully,⁴ a party who dealing with another misleads such other to the latter's injury by the negligent use of words, may be held liable for the damage thereby inflicted.⁵

¹ See Wh. on Neg. §§ 780–793.

² *Infra*, § 1053. As illustrating estoppel by negligence in relation to negotiable paper may be noticed *Foster v. Mackinnon*, L. R. 4 C. P. 704, where the court said: “If a man write his name across the back of a blank bill, stamp and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.” Where there is no stamp act, the liability is unlimited. See *London Bank v. Went-*

worth, L. R. 5 Ex. D. 96, to the effect that a party may by negligence be precluded from taking advantage of the defence of forgery; and, to the same effect, see *Rudd v. Matthews*, Sup. Ct. Ky. 1881. That a party drawing a check carelessly binds himself to the bank, see *Young v. Grote*, 4 Bing. 253.

³ *Supra*, §§ 707, 753, 1045.

⁴ *Infra*, §§ 1054–6.

⁵ Ihering gives as a further illustration of the principle in the text a case in which an order was sent for an Indian-Root Lexicon, which had been advertised, under the impression that it treated of “roots” in the vegetable world. Supposing this mistake vitiated

§ 1052. We have seen that a party employing a telegraph company is bound by the message the company delivers.¹ The same principle would make the principal liable on an invalid bargain his agent makes for him within the range of the agent's authority; and would also make him liable for the agent's negligence under such circumstances.² The invalidity of the bargain would not relieve the principal in such cases. So, as we will see, a party who negligently contracts to do something for another for whom he is not authorized to act, is liable to the promisee for any damages incurred by the latter through the former's error.³

Party employing an agent is liable for latter's negligence.

§ 1053. In all cases based on the negligence of the defendant, the plaintiff's contributory negligence is to be taken into account.⁴ Thus in an action against an infant for negligently representing himself to be of full age, it would be a defence, as we have seen, that the promisee ought to have been put on inquiry by the infant's appearance;⁵ and the same conclusion would be reached in all cases in which the promisee, if he exercised ordinary vigilance, would have made inquiries which would have shown the error.⁶

Contributory negligence is to be taken into account.

§ 1054. Suppose A. represents to me that he is authorized to make with me a particular bargain, and suppose that on the faith of such bargain, I make certain disbursements or receive certain detriment; can I recover compensation for these losses from A.? There is no question that I can in cases of fraudulent misrepresentation,⁷ and there is equal reason to hold that A. would be liable to me for a negligent misstatement of a fact as to which A. ought to have known the truth.⁸ Hence a telegraph company would be liable for failure to transmit, in ac-

Illustrated in suits against agents for unauthorized action.

a contract for the purchase of such a book, the party ordering would nevertheless be required to reimburse the bookseller for any damages he may have negligently incurred in executing the order.

³ *Supra*, §§ 1043 *et seq.*; *infra*, § 1054.

⁴ Wh. on Neg. §§ 300 *et seq.*

⁵ See *supra*, §§ 53, 1047.

⁶ *Supra*, § 245.

⁷ See *supra*, §§ 232 *et seq.*

⁸ *Supra*, §§ 241, 1043.

¹ See *supra*, § 27.

² See Wh. on Neg. §§ 756 *et seq.*

cordance with its published terms, a telegram left with it.¹ It should be added, that in such cases an action might be sustained on an implied contract against the party in accordance with whose invitation work was done or money expended.²

§ 1055. Liability on advertisements has been already distinctively considered; and it has been seen that if a party advertises a reward for certain services, or offers by public notice to do or give certain things in exchange for a *quid pro quo* to be rendered, the performance of the services or the rendering of the *quid pro quo* establishes a contractual relation with the party making the offer.³ Suppose, however, that no such contractual relation is established; is not the party making the offer liable in damages to parties who without negligence incur loss by acting on it? The affirmative is maintained by Ihering with strong reason.⁴ In this view a common carrier advertising that he would carry passengers to a particular point on a particular day, would be liable to parties for damages they sustained by his failure to be ready at the designated time.⁵

§ 1056. The principle before us will sustain the rulings by which telegraph companies have been held liable for failure in discharge of duty. This cannot be put on the basis of abuse of general duty, or abuse of franchise, as it is sometimes called, since a third party, having no business connection with the company as to a particular message transmitted by the company, cannot sue the company for damages he has sustained in consequence of misstatements in such message. It is otherwise, however, as to a party who has entered into a contractual relation with the company by

¹ Wh. on Neg. § 756; *infra*, § 1056.

² See *supra*, §§ 707, 756.

³ See *supra*, § 24.

⁴ Op. cit. 418.

⁵ *Supra*, §§ 25, 800; see Wh. on Neg. §§ 662, 810. The duty of *diligentia in contrahendo*, so argues Ihering, does not begin until acceptance. When a proposal is still unacted on, the party addressed has no claim against the party making the proposal. As soon, how-

ever, as there is acceptance, or such action on the proposal as is equivalent to acceptance, then the party so accepting may have redress from the proposer in case either the contract is not complied with, or the party imposed on is subjected to injury by an illusory contract. As soon, therefore, as a party takes action on a general proposal, he has a claim against the proposer. See *supra*, § 24.

making or accepting the company as his agent for the transmission of information. Hence, a telegraph company is liable to the sender and to the receiver of messages which it negligently misinterprets;¹ and wherever it assumes the duty of communicating with a particular person, and that duty is accepted by such person, then he may maintain an action against the company for negligence in performance of the duty.² It is true that a sendee, as we have seen, cannot maintain an action against the company for non-delivery of a message without first proving an offer accepted by him, to deliver to him the particular message;³ but as soon as such an offer is made (and that it has been made may be inferred from prior dealings as well as from the reception of the telegram) and accepted, by being acted on, an action will lie against the company by a party thus entering into contractual relations with it. Hence, a telegraph company has been held liable to the receiver for its negligence in sending a dispatch in the name of a cashier who the operator ought to have known did not authorize the use of his name.⁴—These distinctions are of peculiar importance in view of the imperfections attending the transmission of intelligence by telegraph. (1) The senders of messages, in order to diminish expense, and sometimes to hide their meaning from the eye of strangers, confine themselves to general terms, or use simply catchwords or signs which are open to constant misconception. They write often in a hurry; and when they write deliberately they are peculiarly apt to subordinate the sense in which a word will be accepted to the sense which, after long pondering, they attach to it. (2) In the translation of words into telegraphic signs, disturbing influences constantly intervene. It has been frequently noticed that blunders will, in the most inexplicable way, creep into print, notwithstanding the supervision of the

¹ See *supra*, § 27; and see Bigelow, Cases on Tort, 621.

² *Supra*, § 791; Wh. on Neg. §§ 756–7; New York Tel. Co. v. Dryburg, 35 Penn. St. 303 Aikin v. Tel. Co., 5 S. C. 358; De la Grange v. Tel. Co., 25 La. An. 383.

³ *Supra*, § 791. See, however, discussion in Big. Lead. Cas. on Torts, 621.

⁴ Elwood v. Tel. Co., 45 N. Y. 549; S. P. as to liability for sending a false message, Bank of Cal. v. Tel. Co., 52 Cal. 280; and see *supra*, § 791.

most careful proof-reading. But the chances of involuntary transmission of words, as well as of intentional corruption, is far greater with telegraphic operators than it is with printers. A telegraphic operator works from manuscript peculiarly obscure, with no subsequent proof-reading; and a telegraphic operator, instead of transferring words to permanent type, puts them into signs which instantaneously vanish from his eye. These signs, also, have not the sharp differential features of printed words. They are dots and strokes, liable to be mistaken for each other; and there are some words of which the signs are so similar as to cause them to be frequently interchanged. (3) The receiving operator not only, as in the last case, may misunderstand the signs, but may write them in such a way that his writing may be misinterpreted.—The consequence of these various disturbing influences is, that the proportion of errors in telegraphic communications is far greater than in any other documents subject to judicial criticism. In view of the large and growing amount of business transacted by telegraph, it is important to keep the principles heretofore stated in this connection in mind. These principles are: (1) A telegraph company is agent for the party sending through it a dispatch;¹ and also of the receiver, as soon as he enters into contractual relations with the company. (2) The sender of a message is liable to the sendee for damages sustained by the latter from acting on the message as delivered; and the telegraph company is liable to the sender if to its negligence the error is imputable.²

¹ *Supra*, § 27.

² The following is from an instructive article in *Blackwood's Mag.* for April, 1881, Eng. ed. vol. 129, pp. 469 *et seq.*:—

"In any system of symbols for letters, consisting of such simple elements as the telegraph alphabet does—viz. dots and dashes—it is inevitable that there should be considerable similarity between the symbols of some words—a similarity which is, of course, productive of mistakes. We may take it that the Morse system of telegraph symbols, having been adopted univer-

sally throughout the telegraphing world, is the best for the purpose that has been devised; and we presume that it is not likely now to be improved upon. And yet there are many words which are so perilously alike that errors in them are sure to recur from time to time. To name but one instance, 'bad' and 'dead' are composed of the same number of dots and dashes, the sole difference being that there is in 'dead' a 'space' or pause wanting in 'bad'—a difference so slight as to require the nicest perception to distin-

guish it. . . . But it is short-sighted policy to make the wording obscure, in order to frustrate hypothetic official curiosity. If secrecy is important, it would be better to use a cipher. In the majority of cases, however, the true plan is to take the officials into your confidence, and write your message in such guise that he who runs may read. As an illustration of the ingenuity with which people will express themselves, as if for the very purpose of defeating their own object, we may cite the following: A lady, some short time since, telegraphed, 'Send them both thanks,' by which she meant, 'Thank you; send them both' (the 'both' referred to two servants). The telegram reached its destination as 'Send them both back,' thus making sense as the official mind would understand it, but a complete perversion of the meaning of the writer. . . . We may roughly classify the different kinds of errors perpetrated by the telegraph into: 1st. Errors which are due to pure guessing—sheer carelessness, we may call it—against which nothing is proof. 2d. Errors closely akin to the first, but in which the first letter or two are common to both words. 3d. There are errors due to the similarity, more or less great, between the signals of different words. Obviousness of meaning will often help to prevent these also.

"We will now present to the reader

a curious collection of telegraph blunders, illustrative of the three categories we have mentioned. The names, we need scarcely remark, are in all cases fictitious. The first category, as we have said, consists of blunders of sheer guessing; and these in their turn may be subdivided into two classes: 1st. Those in which the different idea conveyed is an allied or a cognate idea, or a widely different idea; and 2d. Those in which the different idea conveyed is the exact opposite to the original idea. Let us take those in which a cognate or a widely different idea is given. Here we have: 'Send three tons linseed oil,' transmitted as 'Send three tons linseed meal.'—'Please to send fifteen waggons of Burgie daily till further orders,' transmitted as 'Please to send us fifteen tons of Burgie daily till further orders.'—'Send us two waiters,' transmitted as 'Send us twenty waiters.'—'Warmest sympathy to Ellen and yourself in your sad loss,' transmitted as 'Warmest congratulations to Ellen and yourself in your sad loss.'—'Ask Lady Grantly if Cox can read aloud,' etc., rendered as 'Ask Lady Grantly if you can read aloud,' etc.—'Cox' seems to have rather an unfortunate tendency to be converted into 'you,' for here is another case of it: 'Have just written to Cox to send no more milk,' was rendered 'Have just written to you to send no more milk.'

CHAPTER XXXV.

CONSTITUTIONAL LIMITATION AS TO IMPAIRING
CONTRACTS.

Motives of limitation, § 1061.

Invalidates state legislation impairing contracts between individuals, § 1062.

Invalidates repeals by state legislatures of grants of franchises or of estates unless right of repeal is reserved, § 1063.

Whether exclusive privileges are open to revision is a matter of public policy, § 1064.

Charters subject to reservation, § 1065.

Grants to municipal corporations may be revoked, § 1066.

Laws modifying remedies are constitutional, § 1067.

State discharges do not bind citizens of other states, § 1068.

Marriage not within the limitation, § 1069.

And so as to torts, § 1070.

Tenure of public office may be modified by law, but not specific contracts, § 1071.

§ 1061. The tenth section of the first article of the constitution of the United States provides that “no state shall pass . . . any law impairing the obligation of contracts.” The motives for the introduction of this clause, we learn from the debates and from contemporaneous exposition, were (1) the maintenance of the sanctity of contracts; (2) the preservation inviolable of inter-state trade; and, (3) the vindication of the inherent right of contracting (and it is important to consider this in connection with recent legislation limiting the right)¹ as a primary prerogative of freedom.²

¹ *Supra*, §§ 325, 394.

² In *Gebhard v. R. R.*, 17 Blatch. 416, a Canada statute reducing the interest on the bonds issued by a Canada railroad corporation, was declared, so far as concerns parties not assenting to the reduction, to be void as “repugnant to the fundamental principles of justice.” But see *League v. De Young*, 11 How.

185. That a state constitution is a “law” under the limitation, see *Keith v. Clark*, 97 U. S. 454; *Lehigh Valley R. R. v. McFarlan*, 31 N. J. Eq. 706; *Hays v. Com.*, 82 Penn. St. 518. That a declaratory law overturning an accepted judicial construction of a prior law is void when invalidating a contract under such law, see *Lamberton v. Hogan*,

§ 1062. To take the limitation in its most obvious and general sense, it invalidates all state legislation which impairs contracts between individuals.¹ Hence, legislation reducing interest on existing debts is unconstitutional.² And so is legislation providing for the extinction of antecedent irredeemable ground rents.³

Invalidates state legislation impairing contract between individuals.

§ 1063. The limitation, also, invalidates all repeals by state legislatures of grants of franchises or of estates, unless the right of repeal be reserved in the grant. Hence, a charter by a state legislature granting franchises to a college, without such a reservation, cannot be constitutionally repealed.⁴ Nor when a charter provides that the lands of a college shall not be taxed, can this provision be repealed.⁵ Bank charters, conveying certain banking privileges to the bank corporation, are so far within the limitation that those privileges cannot afterwards, by mere arbitrary legis-

Invalidates all repeals by state legislatures of grants of franchises or of estates, unless the right of repeal is reserved in the grant.

2 Barr, 22; *Reiser v. Savings Fund*, 39 Penn. St. 137; *Haley v. Phil.* 68 Penn. St. 45.

¹ *Williams v. Bruffy*, 96 U. S. 176; *Murray v. Charleston*, 96 U. S. 432; *Edwards v. Kearzey*, 96 U. S. 595; *Memphis v. U. S.*, 97 U. S. 293; *Rehoboth v. Hunt*, 1 Pick. 224; *Hestonville R. R. v. Phila.*, 89 Penn. St. 210; *Rock Hill College v. Jones*, 47 Md. 1; *Ratcliffe v. Anderson*, 31 Grat. 105; see *Williams v. Louisiana*, 103 U. S. 637; *Smith v. Cleveland*, 17 Wis. 556.

² *Roberts v. Cocke*, 28 Grat. 207; *Cecil v. Deyerle*, 28 Grat. 775; *Pretlow v. Bailey*, 29 Grat. 212; see, however, *McAdoo v. Smith*, 5 Baxt. 695. A bank in South Carolina suspended specie payments in Nov. 1860, and never after resumed, paying out its own bills for the last time in August, 1861, and after that date paying its debts only in confederate money.—It was held by a

majority of the judges of the supreme court of the United States that an act of the legislature of South Carolina legalizing the suspension of specie payments was unconstitutional; that the legislature could do no more than relieve the banks from the forfeitures of their charters; but that it could not relieve them from the obligation to pay their debts in specie nor extend the time for such payments. *Waite, C. J.*, *Strong and Bradley, JJ.*, dissenting; *Godfrey v. Terry*, 97 U. S. 171.

³ *Palairot's App.*, 67 Penn. St. 479.

⁴ *Dartmouth College v. Woodward*, 4 Wheat. 518; *Vincennes Univ. v. Indiana*, 14 How. 268; *McGee v. Mathis*, 4 Wall. 143; *Grammar School v. Burt*, 11 Vt. 632; *Brown v. Hummel*, 6 Barr, 86; *University of North Carolina v. Foy*, 1 Murph. 58.

⁵ *Northwestern University v. People*, 99 U. S. 309.

lative process, without due judicial action, be withdrawn.¹—A charter of a railroad corporation, also, cannot be repealed unless the power be reserved;² although such corporation, when a common carrier, may, as we will hereafter see, be subject to limitation as such.³ It must be recollected, at the same time, that charters, being grants of power subtracted from the people as a body in favor of selected individuals, are to be construed strictly so as to pass no privileges which are not expressly given.⁴ An important distinction, also, is to be observed in this respect between grants of franchises by a state and a contract between individuals. A compact between individuals is from the nature of things ephemeral and teu-

¹ *Gordon v. Tax Court*, 3 How. 133; *Planters' Bank v. Sharp*, 6 How. 301; *Curran v. Arkansas*, 15 How. 304; *People v. Manhattan Co.*, 9 Wend. 351; *Bank of State v. Bank of Cape Fear*, 13 Ired. 75. But see *Mechanics' Bank v. Debolt*, 1 Oh. St. 591; *Knoup v. Piqua Bank*, 1 Oh. St. 603, reversed in 16 How. 369.—By the charter of the Bank of Tennessee, granted by the legislature of that state in 1838, it was provided that the state should receive the notes of the bank in payment of taxes. By a constitutional amendment adopted in 1865, it was provided that the issues of the bank during the insurrectionary period were void, and their receipt for taxes was forbidden. It was held by a majority of the supreme court of the United States that the amendment was void as impairing the obligation of the contract embodied in the charter. *Keith v. Clark*, 97 U. S. 454.

² *Greenwood v. R. R.*, S. Ct. U. S. 1882, 25 Alb. L. J. 448.

³ That a franchise of a bridge or ferry company may be taken away, and either resumed or elsewhere distributed, upon compensation given, was held in *West River Bridge v. Dix*, 6 How. 507; *White River Turnpike Co. v. R. R.*, 21 Vt. 590; *Boston Water*

Power Co. v. R. R., 23 Pick. 360; *Enfield Bridge Co. v. R. R.*, 17 Conn. 40, 451; *Beekman v. R. R.*, 3 Paige, 45. That a promise by a legislature not to tax a particular franchise or property may be revoked was maintained in *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 69; *Debolt v. Ins. Co.*, 1 Oh. St. 563; *Knoup v. Piqua Bank*, 1 Oh. St. 603; which, however, were reversed by the supreme court of the United States in *Piqua Bank v. Knoup*, 16 How. 369; and see *Armington v. Barnet*, 15 Vt. 751; *Osborne v. Humphrey*, 7 Conn. 335; *State v. Hoboken*, 43 N. J. L. 96. That where a charter exempts a corporation from taxation, taxation cannot subsequently be imposed, see *Northwestern University v. People*, 99 U. S. 309; *Lansing v. Muscatine Co.*, 12 Int. Rev. Rec. 56; 1 Dillon, 522. That a statute giving precedence to the lien of taxes is constitutional, see *Lydecker v. Palisade Co.*, 33 N. J. Eq. 415. That state taxation which abrogates existing contracts is unconstitutional, see *Murray v. Charleston*, 96 U. S. 432.

⁴ *Supra*, §§ 137 *et seq.* 666, 672; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 81-5; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

tative; the contracting parties soon die, and, at least in a generation, so far as they are concerned, the engagement ceases to operate. But grants of franchises from the state, if under the shelter of the limitation before us, are of perpetual continuance. No matter how great may be the change of surrounding circumstances, or how injurious these privileges may become to the community as a whole, they will continue to exist if so protected. Hence it becomes peculiarly important, in applying the limitation, to keep in mind the rule that when there are two equally probable constructions open to a grant of a charter by the sovereign, the construction which parts with the least portion of sovereignty is to be preferred.¹

§ 1064. We have already seen that the question whether engagements restricting trade are to be regarded as contracts depends upon public policy.² The same distinctions are applicable to grants of exclusive privileges. It is true that it has been ruled by the supreme court of the United States that a condition in a bridge charter providing that it shall not be lawful to build another bridge within the range of two miles, is a contract the state cannot recall.³ But it may be replied that this decision rests on a *petitio principii*; since, if such an engagement is unduly restrictive of trade, it is not, on the reasoning above given,⁴ a contract, and hence is not within the scope of the limitation before us.⁵ On this distinction may be sustained the more recent rulings of the same court

Whether exclusive privileges are open to revision is a matter of public policy.

¹ *Supra*, § 666.

² *Supra*, §§ 430 *et seq.*

³ *Binghamton Bridge in re*, 3 Wall. 51; three judges dissenting.

⁴ *Supra*, § 433.

⁵ See *Beer Co. v. Mass.*, 97 U. S. 25; *Central Corporation v. Lowell*, 15 Gray, 106; *English v. R. R.*, 32 Conn. 240; *U. S. v. Great Falls Co.*, 21 Md. 119; *Schurmeier v. R. R.*, 10 Minn. 82.—In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, it was held that a charter to a company for the building of a bridge over Charles River, giving it a

right to take tolls for seventy years, did not give such a franchise as would make unconstitutional a subsequent charter to a new company to erect a bridge within a few rods of the Charles River Bridge, although this worked a great diminution of the income of the latter bridge. On this question the supreme court of Massachusetts was equally divided. S. C., 7 Pick. 344. See 3 Pars. on Cont. 536, citing as confirming the rule in 11 Pet. 420; *West River Bridge v. Dix*, 6 How. 532; *White River Co. v. R. R.*, 21 Vt. 590;

to the effect that it is within the power of a state legislature to prescribe restrictions, not in themselves unreasonable, on the charges of railroad corporations acting as common carriers under charters granted by the state.¹—Two extremes are to be noted on the question of legislative and judicial interference with contracts, whether contained in charters or in transactions between individual citizens. On the one side, a statute providing that all contracts shall be invalid, would unquestionably conflict with the constitution. On the other side, it could not be maintained that a statute providing that “contracts” (inaccurate as the term in such a case might be) to do an illegal act would be invalid, since a bargain to do an illegal act is not a contract,² and hence not within the protection of the limitation. The same criticism may be made as to statutes providing that “contracts” by persons decreed to be insane or spendthrifts, shall not be valid; it would be a *petitio principii* to declare such bargains “contracts,” since the question at issue is whether such persons are capable of contracting.—Between these extremes lie a series of intermediate cases, in which bargains have been declared inoperative as against the policy of the law.³ How far statutes and decisions which abrogate contracts in cases of this class are in conflict with the limitation of the constitution, is a question which must be determined on the distinctive merits of each particular case. There can be no doubt, for instance, that statutes making invalid contracts for the sale of intoxicating liquors are constitutional.⁴ On the other hand, there may be serious

Mohawk Bridge v. R. R., 6 Paige, 554; Thompson v. R. R., 3 Sandf. Ch. 625; Tuckahoe Canal Co. v. Tuckahoe R. R., 11 Leigh, 42; Harrison v. Young, 9 Ga. 359. Though see distinction by Curtis, J., in Richmond R. R. v. Louisa R. R., 13 How. 71.

¹ Munn v. Illinois, 94 U. S. 113; Chicago, etc. R. R. v. Iowa, 94 U. S. 155; Peik v. R. R., 6 Biss. 177; 94 U. S. 164; Chicago, etc. R. R. v. Ackley, 94 U. S. 179; Winona, etc. R. R. v. Blake, 19 Minn. 434; 94 U. S. 180; Stone v. Wisconsin, 94 U. S. 181;

Union Pacific R. R. v. U. S., 99 U. S. 700, 719. That in matters of police the promotion of the general welfare of the community justifies the modifying of a grant, see Phalen v. Virginia, 8 How. 163; Beer Company v. Massachusetts, 97 U. S. 25; Vanderbilt v. Adams, 7 Cow. 349; Hirn v. Ohio, 1 Oh. St. 15; Pierce on Railroads, 468-9.

² *Supra*, §§ 335 *et seq.*

³ *Supra*, §§ 414, 430, 442 *et seq.*

⁴ Beer Company v. Massachusetts, 97 U. S. 25.

doubts as to the constitutionality of legislation annulling contracts for the buying up by middlemen of produce or other commodities.¹—It may be said that such legislation would be operative, if not as to antecedent, at least as to subsequent contracts. But this would not be true if the effect be materially to impair the liberty of contracting on the part of individuals. The question is one of police. If the bargain be to do an act in itself injurious to the health, or morals, or peace of the community, then it may be prohibited in harmony with the provision before us. But it cannot be prohibited merely because the state legislature, its object not being *per se* wrongful or prejudicial to the state, makes that object illegal.

§ 1065. In the constitutions of several states, it is provided that in all charters granted by the state the right of repeal or of amendment is reserved; and a clause to this effect is now included in most cases in charters granted in states in which no such constitutional restriction obtains. In some states such reservations are part of the general system of legislation, in subordination to which all charters are issued.² When such limitations exist, they control all charters granted while they are in force.³

Charters
subject to
reserva-
tions.

¹ *Supra*, §§ 442, 453 *b*.

² See *Beer Co. v. Massachusetts*, 97 U. S. 25; *Stanley v. Stanley*, 26 Me. 191; *Jones Man. Co. v. Com.*, 69 Penn. St. 137; *State v. Greer*, 9 Mo. Ap. 219. See for an examination of such exceptions, *Greenwood v. R. R.*, Sup. Ct. U. S. 1882, 25 Alb. L. J. 448.

³ *Harper v. Ampt*, 32 Ohio St. 291.

By the code of Georgia, private corporations are subject to be changed, modified, or destroyed, at the will of the legislature, except so far as forbidden by law, and in all cases of private charters granted after the adoption of the code, the state reserves the right to withdraw the franchise unless such right be expressly negated in the charter. Some time after this code took effect, two railroad corporations

created prior to that date, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an act of the state legislature, which authorized a consolidation of the stock of the two companies, conferred upon the consolidated company full corporate powers, and continued to it the franchises and privileges and immunities which the companies had held by their original charters. It was held by the supreme court of the United States (1) that by the consolidation the original companies were dissolved and a new corporation was created, which became subject to the provision of the code; (2) that a subsequent legislative act taxing the property of such new corporation as other property in the state

§ 1066. Grants to municipal corporations, and to other public corporations for public purposes, may be revoked as not contracts within the sense of the limitation.¹ It is otherwise as to grants of private property, or private franchises, or private trusts.² The distinction is, that while property transferred to a municipal corporation cannot be recalled by the state, the mode of the public use of such property can be controlled by legislation, and to this control are subjected all franchises given to a municipal corporation for public use.³

§ 1067. How far, under the limitation before us, taken in connection with the authority given to congress to enact a bankrupt law, the states can by general legislation relieve creditors from the payment of debts, is a question which it is not within the range of the present work to discuss in detail. At present it must be sufficient to say that it is within the constitutional power of the states to pass exemption laws, exempting specific property from execution, provided this does not materially impair the remedy;⁴ laws modifying the effect of antecedent mechanics' liens, leaving the debt open to suit at common law;⁵ laws modifying the appraising of property on foreclosure of antecedent mortgages;⁶ laws modifying process for antecedent debts, *e. g.*, abolishing imprisonment for debt;⁷ and laws which take away specific remedies, leaving other adequate remedies in force.⁸ But a statute providing that a sale shall not be

was taxed was not in conflict with the constitutional limitation protecting contracts. *Atlantic & Gulf R. R. Co. v. Georgia*, 98 U. S. 359.

¹ *Terrett v. Taylor*, 9 Cranch, 43; *People v. Morris*, 13 Wend. 325; *Trustees v. Tatman*, 13 Ill. 27; *Mills v. Williams*, 11 Ired. 558; *Wallace v. Sharon*, 84 N. C. 164.

² *Terrett v. Taylor*, 9 Cranch, 43; *Pawlet v. Clark*, 9 Cranch, 292; *Bailey v. New York*, 3 Hill, N. Y. 531; *Fort Plain, etc. Co. v. Smith*, 30 N. Y. 44.

³ *East Hartford v. Bridge Co.*, 10 How. 511; *S. C.*, 17 Conn. 79.

⁴ *Morse v. Goold*, 1 Kern. 281; *Rockwell v. Hubbell*, 2 Doug. 197; *Taylor v. Stockwell*, 66 Ind. 505; see *Tarpley v. Hamer*, 9 Sm. & M. 310.

⁵ *Templeton v. Horne*, 82 Ill. 491.

⁶ *Jones v. Davis*, 6 Neb. 33.

⁷ *Penniman in re*, 103 U. S. 714; *S. C.*, 11 R. I. 333; *Sturges v. Crowinshield*, 4 Wheat. 122; *Beers v. Haughton*, 9 Pet. 359; *Ware v. Miller*, 9 S. C. 13.

⁸ *Jackson v. Lamphire*, 3 Pet. 288; *Bronson v. Kinzie*, 1 How. 315; *McCracken v. Hayward*, 2 How. 608; *Tennessee v. Sneed*, 96 U. S. 69; *Memphis, etc. R. R. v. Tennessee*, 101 U. S. 337;

made under an execution unless the property levied on should bring two-thirds of a valuation attached to it by appraisers, has been held unconstitutional in respect to debts incurred prior to the passage of the act;¹ and so of a statute relieving a bank from the duty of paying specie on its notes.² And state insolvent laws, undertaking to discharge antecedent debts, are inoperative,³ and so are laws so far exempting the debtor's property from execution as materially to impair his liability for antecedent debts,⁴ and staying execution for any extended period on antecedent debts,⁵ or putting other material obstacles in the way of their collection,⁶ or virtually precluding recovery on them.⁷

State v. Gaillard, 11 S. C. 309; 101 U. S. 433; *Louisiana v. New Orleans*, 102 U. S. 203; *Koshkoning v. Burton*, 104 U. S. 668; *Newark Savings Inst. v. Forman*, 33 N. J. Eq. 436; *Long's Appeal*, 87 Penn. St. 114; *Richardson v. Arkin*, 87 Ill. 138; *Watts v. Everett*, 47 Iowa, 269; *Northwest. Ins. Co. v. Neeves*, 46 Wis. 147; *Whitehead v. Latham*, 83 N. C. 232; *Horne v. State*, 84 N. C. 362; *Carnes v. Red River Parish*, 29 La. An. 608; *Vance v. Vance*, 32 La. An. 186.

A state funding act, which excludes from its operation certain bonds, supposed to be tainted with illegality, until their legality is established in court, is not, although affecting *bona fide* holders, in conflict with the limitation. *New York Guaranty Co. v. Board of Liquidation*, U. S. Sup. Ct. 1882; 4 Morris. Trans. 508.

Where the statute of Alabama subjecting the state to suit in its own courts was in force at the time when a contract with it was made and a suit thereon brought, but the functions of the courts were essentially those of a board of audit, and the plaintiff had no means of enforcing the payment of a judgment or a decree in his favor, it was held that the repeal of the statute de-

prived the court of jurisdiction to proceed, and was not in violation of the contract clause of the constitution of the United States. *South & North Ala. R. R. Co. v. Alabama*, 101 U. S. 832. See *Memphis, etc. R. R. v. Tennessee*, 101 U. S. 337.

¹ *McCracken v. Hayward*, 2 How. 608.

² *Godfrey v. Terry*, 97 U. S. 171.

³ *Sturges v. Crowninshield*, 4 Wheat. 122; *Farmers', etc. Bank v. Smith*, 6 Wheat. 131; *Ogden v. Saunders*, 12 Wheat. 213; *Planters' Bank v. Sharp*, 6 How. 301; *aliter* as to debts after the passage of the act, *Eckstein v. Shoemaker*, 3 Whart. 15.

⁴ *Lewis v. Lewis*, 47 Penn. St. 127; *Baldwin v. Flagg*, 43 N. J. L. 495; *Barnes v. Barnes*, 8 Jones L. 366; *Wilson v. Brown*, 58 Ala. 62.

⁵ *McClain v. Easley*, 4 Baxt. 520; *Bunn v. Gorgas*, 41 Penn. St. 441; *Williams's Appeal*, 72 Penn. St. 214.

⁶ *U. S. v. Lincoln Co.*, 5 Dill. 184; *U. S. v. Johnson Co.*, 5 Dill. 207; *West. Ark. Bk. v. Sebastian Co.*, 5 Dill. 414; *Olmstead v. Kellogg*, 47 Iowa, 460; *McCracken v. Moody*, 33 Ark. 81.

⁷ *People v. Otis*, 24 Hun, 519; *Edwards v. Kearzey*, 96 U. S. 595; *New Orleans v. City Hotel*, 28 La. An. 423.

§ 1068. Whether a state law discharging under insolvent procedure binds contracts elsewhere to be performed, or the parties to which are elsewhere domiciled, are questions which are discussed in another work. It may be here stated that a state has a right to bind its domiciled citizens, and all other consenting parties, so far as concerns future contracts, by legislation of this character, but not other persons. It is also settled that parties domiciled in other states, whether contractors or endorsees or purchasers, are not barred by such insolvent discharges from the fact that the debt is payable in the discharging state.¹ But where there is a contract between two citizens of the same state, one of whom subsequently removes to another state, the removal does not relieve the creditor removing from an insolvent discharge by the first state.²

State discharges do not bind citizens of other states.

§ 1069. It is agreed on all sides that marriage is not within the limitation before us. Divorces may be granted by states having jurisdiction irrespective of the question of the place where the marriage was solemnized.³

Marriage not within the limitation.

¹ Wh. Conf. of Laws, 2d ed. §§ 525 *et seq.*, and cases there cited.

² *Stoddard v. Harrington*, 100 Mass. 87; and see generally *Baldwin v. Hale*, 1 Wal. 223.

In *Guernsey v. Wood*, 130 Mass. 503, A., the agent of C., the plaintiff, a resident of Pennsylvania, sold goods in Massachusetts to defendant, a resident there, who supposed A. to be P., the principal. Afterward D., who had not paid for the goods, was discharged from liability for his debts under the insolvent law of Massachusetts. C. did not consent to the discharge or take part in the proceedings therefor. In an action by C. to recover the price of the goods, it was ruled that the discharge could not be set up by D. the defendant. The contract, it was argued, being in fact made by the plaintiff's agent in his behalf, he had the

right to sue thereon. Of that right he could not be deprived by the insolvent law of Massachusetts without his consent. He did not give such consent by the making of a contract in this commonwealth, either by himself or through an agent, even if the contract is to be performed here. "The fact that the certificate of discharge obtained by the defendant under that law might have been pleaded in bar of an action brought by the agent cannot make it available in this action brought by the principal, who is not a citizen of the commonwealth and is not bound by that law." The court (Gray, C. J., giving the opinion) relied on *Baldwin v. Hale*, 1 Wall. 223; *Baldwin v. Bank of Newbury*, id. 234; *Kelley v. Drury*, 9 Allen, 27; *Ilsley v. Merriam*, 7 Cush. 242; *Fessenden v. Willey*, 2 Allen, 67.

³ Wh. Conf. of Laws, §§ 223 *et seq.*

§ 1070. Claims arising from torts (*e. g.*, damage to property by a mob, for which a prior statute had created responsibility), are not within the limitation; and statutes modifying such responsibility are constitutional.¹

And so as to torts.

§ 1071. Nor do the engagements made by state or municipality with public officers constitute a contract within the purview of the limitation before us. The salaries of such officers may be reduced or their terms of office closed by action of legislature, of municipality, or of constitutional convention.² On the other hand, a contract between a state and a party, whereby he is to perform certain duties for a specific period, at a stipulated compensation, is so far within the protection of the limitation that he cannot be deprived of such compensation by the repeal of the statute under which the contract was made.³

Tenure of public office may be modified by law but not specific contracts.

¹ State *v.* New Orleans, 32 La. An. 709. Com. *v.* Mann, 5 W. & S. 418; Barker *v.* Pittsburgh, 4 Barr, 49; Whittington

² Butler *v.* Pennsylvania, 10 How. 402; Warner *v.* People, 2 Denio, 272; Bond, 41 Md. 137; Toledo Bank *v.* Conner *v.* N. Y. 2 Sandf. 355; 1 Seld. Bond, 1 Oh. St. 622.

285; Com. *v.* Bacon, 6 S. & R. 322; ³ Hall *v.* Wisconsin, 103 U. S. 5.

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